85-1741

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,
AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether national standards promulgated by the Environmental Protection Agency under the Clean Water Act are invalid because the Agency failed to provide notice and an additional opportunity to comment, pursuant to section 4 of the Administrative Procedure Act, on substantive changes made to its proposed regulations.

PARTIES TO THE PROCEEDING[1]

Petitioner American Mining Congress is a national trade association whose members produce most of the nation's metals, coal, uranium, and other mineral products. Petitioners AMAX Inc.,[2] ASARCO Incorporated[3] and St. Joe Minerals Corporation[4] are major U.S. producers of metals, including primary lead, zinc and copper.

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[1] In the court below, the following were also parties: Kennecott, GTE Products Corporation, Secondary Lead Smelters Association, Gulf Coast Lead Company, Inc., and Mallinckrodt, Inc.

[2] Petitioner AMAX Inc. has the following affiliated companies: Alumax Inc. and Canada Tungsten Mining Corporation, Ltd.

[3] Petitioner ASARCO Incorporated has the following non-wholly owned subsidiaries or other associated companies: Alta Mining and Development Company, Blackhawk Mining and Developing Company, Limited, Compania Miners Quioma S.A., Federated Genco Limited, Fry's Metals, Inc., Geominerals, Ltd., Government Gulch Mining Company Ltd., Green Hill Cleveland Mining Company, Liard River Mining Company Ltd., Mexico Desarrollo Industrial Minero, S.A., M.I.M. Holdings Limited, Empress Miners Beranguela S.A., Empress Miners Cerro Grande S.A., Midetco Ltd., Lesarco, Inc., Neptune Mining Company, Corporacion Miners Nor Peru, S.A., Southern Peru Copper Corporation, Wyoming Mining and Milling Company Ltd.

[4] Petitioner St. Joe Minerals Corporation is a wholly owned subsidiary of Fluor Corporation. The following are non-wholly owned subsidiaries or affiliates of St. Joe Minerals Corporation: B & W Micronutrients, Inc., St. Joe Gold Corporation, Massey Coal Company (partnership between subsidiaries of St. Joe Minerals Corporation and Shell Oil Company), and Yuba Placer Gold Company (joint venture between a subsidiary of St. Joe Minerals Corporation and Yuba Natural Resources, Inc.).

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OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, AMAX INC., ASARCO INCORPORATED, AND ST. JOE MINERALS CORPORATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners American Mining Congress, AMAX Inc., ASARCO Incorporated, and St. Joe Minerals Corporation ("Petitioners") pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered on December 26, 1985.

OPINION BELOW

The opinion of the court of appeals below is reported at 780 F.2d 445. It is reproduced in Appendix A.

JURISDICTION

The opinion of the court of appeals was issued December 26, 1985. The Order denying rehearing and rehearing *en banc* was issued on January 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 553) is reprinted in App. H. Relevant portions of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified as amended at 33 U.S.C. §§ 1251-1376 (1981), at issue here, are reprinted in App. I.

STATEMENT OF THE CASE

This case presents an issue of great and recurring importance under a major Federal environmental law and the governing procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). The case arises out of petitions to review national standards (known as effluent limitations guidelines) set by the Environmental Protection Agency ("EPA" or "Agency") for portions of the U.S. metals industry in a rulemaking proceeding under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1981); 40 C.F.R. § 421. In proposing the limitations EPA sought comment on certain specific technologies for the control of water pollution effluents. Comments by Petitioners demonstrated to the Agency that such technologies could not achieve the proposed limitations. EPA thereupon decided to adopt and promulgate a substantially dif-

ferent technology—one, of which the Petitioners and public had not been placed on notice, and that had not been the subject of any comments.

Petitioners challenged the regulations[1] pursuant to 33 U.S.C. § 1369(b), and the Fourth Circuit upheld EPA's action. It succumbed to the temptation to defer to the Agency's claimed expertise, and failed to hold the Agency to the notice and fairness requirements of the APA. Since EPA's adopted technology had never been exposed to comment because of lack of notice, the court below had an inadequate record and was in no position to determine whether the rule was the product of an informed and reasoned judgment.

Petitioners are major lead, zinc and copper producers in the United States, and a national trade association. Their operations are deeply affected by federal environmental laws and regulations, including the Clean Water Act requirements at issue.

Rulemaking Proceeding

On February 17, 1983, EPA, pursuant to section 304 of the Clean Water Act, 33 U.S.C. § 1314, proposed twelve sets of nationally applicable effluent guideline regulations for "Nonferrous Metals Manufacturing." Regulations were proposed, *inter alia*, for the U.S. lead, zinc and copper industries.

The Clean Water Act requires the national effluent guideline regulations to "identify . . . the degree of effluent reduction attainable through the application

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[1] Petitioners challenged four of the twelve sets of regulations issued by EPA: 40 C.F.R. Part 421, Subparts E, G, H and I. Other industries challenged different regulations, and the court below consolidated all the cases over the opposition of all the petitioner-litigants. See App. 60a.

of the best control measures and practices achievable." 33 U.S.C. § 1314(b)(2)(A). In promulgating these technology-based regulations, EPA must *first* identify the best control measures and practices achievable, and *then* set the actual discharge limits based on the capability of the technology identified. The identification by the EPA of the control measure is a crucial step because the actual limits are based on the capacity of the technology selected. The control technology from one industry may be "transferred" (*i.e.*, identified) to another if the processes are similar, but EPA may choose to have different discharge limits for the two industries. Thus, the identification of the technology is a fundamental step in the rulemaking process.

In the rulemaking at issue, EPA published in the Federal Register proposed effluent limitations and specified the six pollution control technology options it was considering, and it requested specific comments on them or any other alternative technologies.[2] The six options included two waste treatment processes frequently used by Petitioners: "lime and sedimentation" (known as "lime and settle") and "lime, settle

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[2] The 94 page proposal included a list of "in-process" systems and several "in-place" systems considered for proposal (App. 64a-67a), and then it specified the six "control and treatment options" that were selected for final consideration. App. 67a-68a. Comments were requested on these six options: "The Agency specifically requests long-term sampling data (especially paired raw wastewater—treated effluent data) from nonferrous metals manufacturing plants having well-operated treatment systems using the treatment technologies *relied upon for this regulation*, and also other equally effective treatment technologies." 48 Fed. Reg. 7073 (Feb. 17, 1983) (emphasis added). App. 69a.

and filter." The Agency regarded these as two separate and distinct treatment options.

After the publication of Notice in the Federal Register, EPA distributed to interested parties a proposed Development Document, which was not published in the Federal Register. That 3-volume document consisted of over 2100 pages, and contained, *inter alia*, general descriptions of over 25 technologies, including a process known as sulfide precipitation. Nowhere in that document was it stated or even suggested that sulfide precipitation was either being considered as an option or a supplement to one of the six stated options.

During the development of the Agency's 55,000 page administrative record ("Record") sulfide precipitation was never addressed as being an alternative or supplement to the six options, nor was it ever mentioned in *any* of the comments. Petitioners focused their attention on the options listed for consideration in the Federal Register, especially "lime and settle" and "lime, settle and filter," systems with which they were extremely familiar. They had grave concerns about the sampling and analysis data relied on by EPA which, for the most part, was from other industries. As a result they undertook a major effort to submit to EPA data developed by experienced industry professionals and consultants on the treatment capabilities of the six technologies.

Participation in Rulemaking

During the comment period, Petitioners submitted hundreds of pages of comments plus over 30,000[3]

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[3] The court below notes the Agency relied on "only 300 raw

sampling and analysis results obtained from the industry's seven major plants, taken over the course of seven years. Petitioners also met twice with EPA representatives to discuss the data.[4] The thrust of Petitioners' comments was that the precise limits called for by the proposed regulations (that were based on data from five other industries) were impossible to meet with the six technologies. The Agency was urged to consider the comprehensive data submitted by Petitioners since it represented the actual industry being regulated.

After the close of the comment period, EPA representatives notified Petitioners that the sulfide precipitation technology was being considered since the original six options did not seem capable of achieving the discharge limits in the proposal.[5] EPA representatives stated that they were considering sulfide precipitation in addition to the "lime, settle and filter"

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and treated data points" (App. 10a); these were obtained from other industries. The court upheld the Agency's rejection of Petitioners' comprehensive, industry-specific data.

[4] The EPA minutes of one meeting were prepared three months later, and those for the second were prepared more than two months afterwards. Record pp. 44439 and 44443.

[5] The notification that the Agency was considering a new technology occurred during a January 5, 1984 conference phone call between representatives of EPA and Petitioners, *after* the comment period had closed. The normal procedure is for the Agency to prepare a memorandum of such a phone call and include it in the Administrative Record, although the Agency made *no record* of this phone call. The only record of the conversation is in the affidavit attached to Petitioners' Reply Brief in the Fourth Circuit, to which the Agency did not object. See August 2, 1985 Court Order App. 39a, and affidavit from Reply Brief App. 40a-49a.

process. Petitioners requested an opportunity to comment on sulfide precipitation to demonstrate inadequacies of such treatment in certain circumstances. Permission to submit any comments on the new technology was denied by EPA. Since no comments were allowed, the only data on the new technology in the Record was that developed by the Agency. Petitioners could not even obtain from EPA a copy of Agency test results on the new technology until May, 1984, three months after the final regulations were published, and then only after a Freedom of Information Act request was filed. See App. 47a-49a. The final regulations were based on the new technology[6] selected internally by EPA after the close of the comment period.[7]

Decision Below

In rejecting Petitioners' challenge to EPA's regulations on the issue of adequate notice, the Fourth Circuit held that Petitioners' "should reasonably have known that EPA was considering sulfide precipitation." App. 15a. While the court acknowledged that

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[6] See *e.g.* the notice in the final regulations: "The Agency has amended the proposed BAT technology basis for primary lead plants operating acid plants to include sulfide precipitation." 49 Fed. Reg. 8760 (March 8, 1984), App. 71a.

[7] There is a serious question whether this EPA procedure of predetermining regulatory limits *prior* to selecting the model technology is in violation of § 304(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1314(b)(2)(A). The court below did not address this issue which was raised by Petitioners in their principal and reply briefs. The court below referred to the EPA proposed limits as the "established effluent guidelines." App. 14a. The limits were not established; they were proposed and still under Agency consideration, along with the technology to meet them.

sulfide precipitation was not among the EPA's listed six control and treatment options in the proposed rule, the court found that the preamble to the proposed rules "specifically asked for comments on alternative treatment technologies." App. 15a. Additionally the court found that EPA's associated Development Document "included both lime and settle and sulfide precipitation in its discussion of effective chemical precipitation methods." App. 15a.

The court below discussed the "logical outgrowth" rule and concluded that "EPA did not violate the requirements of the Administrative Procedure Act when, *in an attempt to respond to industry comments and complaints,* it added sulfide precipitation as a supplement to the Best Available Technology on which its effluent limitations were grounded." (emphasis added). App. 15a.

Throughout the court's opinion are references to deferral to Agency expertise.[8] This deference undoubtedly led the court to accept, without benefit of any comments and contrary to Petitioners' position, the Agency's contentions that sulfide precipitation was simply the addition of a second step to the "lime, settle and filter" technology, that it could be transferred to Petitioners' plants from experience gained outside the industry, and that it is a "more effective treatment than the conventional lime and settle process." App. 17a.[9] These determinations were based to-

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[8] The court below summarily deferred to Agency expertise on a number of far-reaching technical issues raised in Petitioners' briefs. There is no explanation of the EPA bases for such conclusions.

[9] If sulfide precipitation is a more effective technology than

tally on the EPA references in the 55,000 page Record, none of which were contained, or referred to, in the Federal Register notice.

The court also denied a Motion of Petitioners to Supplement the Administrative Record. App. 55a. Insofar as sulfide precipitation was concerned, Petitioners sought to include in the Record long-term data from a foreign plant (relied upon by EPA) showing that sulfide precipitation would not achieve the prescribed limits, evidence of a meeting between representatives of EPA and the foreign plant (prior to the promulgation of the regulations) in which EPA representatives were told that EPA samplings from that plant were not representative of long-term performance, and Petitioners' estimates of the costs of sulfide precipitation which were not considered by the Agency since no comments had been allowed.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL ADMINISTRATIVE AND ENVIRONMENTAL LAW

This case presents an issue of great importance in rulemaking proceedings conducted by the Environmental Protection Agency, and other agencies, under the Administrative Procedure Act, 5 U.S.C. § 553. It raises the question of what obligation a federal agency

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the conventional "lime, settle and filter" process, it raises the question why sulfide precipitation was not designated in the Federal Register as an option for consideration in the originally proposed rules.

has under section 4 of the APA to give notice and opportunity for comment on a rule that differs substantially from the originally proposed rule and has been adopted in response to complaints and comments directed at the initial proposal. The question is a recurring one that, according to Justice Rehnquist, "will ultimately require interpretation of important statutory language by this Court," *Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 1098 (1980), dissent in order denying certiorari.

If the decision below is allowed to stand it will have a chilling impact on the public's ability to participate meaningfully in rulemaking proceedings. The case also takes on added significance because of the prominent role informal rulemaking proceedings have in the implementation of Environmental Laws. They involve voluminous amounts of technical and scientific material with no opportunity for a hearing.

A. The Fourth Circuit Misinterpreted the Notice Requirements of the Administrative Procedure Act

Section 4 of the Administrative Procedure Act requires that the notice in the Federal Register of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1966). It is well-acknowledged that this notice requirement serves to benefit both the public and the agency involved,[10] by encouraging public comment

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[10] See *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

and testing the rules, providing a fair opportunity for all views,[11] and creating a record for judicial review.[12]

It is especially important that adequate notice be given in EPA rulemakings because of the large amount of technical data normally involved in such proceedings. It is incumbent upon EPA to identify issues and related data with "reasonable specificity" in order to avoid an "elaborate treasure hunt, in which interested parties, assisted by high-priced guides (called 'lawyers'), must search the record for the buried treasure of a possibly relevant comment."[13]

While the Fourth Circuit acknowledged the need to afford notice "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking," citing *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985), it erroneously interpreted what constitutes adequate notice.

The court's suggestion that Petitioners "should reasonably have known that EPA was considering sulfide precipitation" was based on two factors: (1) "EPA specifically asked for comments on alternative treat-

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[11] See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980), and *National Association of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

[12] See *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1271 n. 54 (9th Cir. 1977).

[13] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 550.

ment technologies" in the preamble to the proposed rules; and (2) EPA's associated Development Document included sulfide precipitation in its discussion of effective precipitation methods. App. 15a.

To suggest that the Agency's request for "alternative treatment technologies," and nothing more, placed Petitioners' on notice of *anything*, let alone that sulfide precipitation was under consideration, does not comport with the APA's requirement that the notice be sufficiently descriptive to give the public a fair opportunity to comment and participate in the rulemaking. And the lack of notice is exacerbated where, as here, no party in its comments even suggested such a technology. The absence of any comments on sulfide precipitation plainly emphasizes the lack of adequate notice,[14] particularly in light of the substantial comments submitted by Petitioners.

The court's reliance upon the proposed Development Document as satisfaction of the notice requirements of the APA is equally misplaced. That document was not published in the Federal Register and consisted of over 2100 pages, including a boilerplate catalog of more than twenty-five existing water treatment technologies. Sulfide precipitation was just one of the technologies discussed, and it was not identified as one of the options under consideration as a proposed model technology. The decision below would place an intolerable burden on commentators, requir-

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[14] See *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 135 (D.C. Cir. 1976) and *PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) which states "the importance of the issue was belied by the obscurity of the footnote intended to give notice, (and) by the lack of meaningful comment."

ing them to address every technology discussed in a Development Document even though the Agency published a notice in the Federal Register specifying the technologies under final consideration.[15] The court relied on assertions and interpretations of data on sulfide precipitation that first appeared in the Agency's brief; they were not addressed in the rulemaking. The only "record" before the court was information EPA presented. When Petitioners attempted to address these matters, the Agency moved to strike the material from Petitioners' brief, and the court granted the motion. App. 55a, 52a.

The decision below failed to understand the nature of a proposed Development Document. It is not a proposal, but simply the means of providing background data and details with respect to the rulemaking.[16] *American Paper Institute v. EPA*, 660 F.2d 954, 959 n.13 (4th Cir. 1981); *Appalachian Power Co. v. EPA*, 579 F.2d 846, 853 (4th Cir. 1978); *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977).

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[15] The vice of such a requirement is readily apparent in this case. Here Petitioners, in addressing the six proposed technology options, submitted hundreds of pages of data and 30,000 sampling results. The decision below would have increased Petitioners' burden four-fold. That indeed would be a classic "paper chase."

[16] The final Development Document contains sulfide precipitation data obtained by EPA *after* the rulemaking: "Information contained in this paragraph was added by the Agency after promulgation of the regulations and is not part of the Administrative record." Record 46973. This is somewhat incongruous since the Development Document itself is in the record.

B. The Fourth Circuit Misinterpreted the "Logical Outgrowth" Rule

The decision also erroneously held that sulfide precipitation technology was a "logical outgrowth" of the original proposal; it misconstrues that concept. Logical outgrowth must stem from the Agency's *proposal*, and not from a response to comments or complaints, if a substantial change in a proposed rule without further notice is to be sanctioned. The Agency itself must provide the notice of a regulatory proposal. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549 (D.C. Cir. 1983). See also *Taylor Diving & Salvage Co., Inc. v. Dept. of Labor*, 599 F.2d 622 (5th Cir. 1979); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972). It is the Agency's responsibility to provide notice of a proposed rule; comments by other parties do not satisfy that obligation. As stated in *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d at 1104:

> "An agency, however, does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period. An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments."

In this case Petitioners could scarcely have been alerted to any changes in the rule prompted by the comments, since neither the proposal nor the comments even mentioned sulfide precipitation. The decision adopts *in toto* the EPA position on sulfide

precipitation which was developed entirely without public input or scrutiny.[17]

The court below clearly extended the logical outgrowth theory beyond legal limits, relying heavily upon the comments as the nexus to the final proposal. The court noted that the "comments led EPA to reexamine its selections of model technologies and data basis." It also observed that changes can be a " 'logical outgrowth' of the original proposal and the notice and *comments* upon it." (emphasis added). In validating EPA's addition of sulfide precipitation, it referred to the fact that it was "an attempt to respond to industry comments and complaints."[18] App. 15a. It is clear then that the court considered the complaints and comments as the trigger for the final proposal.

The court's failure to order the EPA to provide a further opportunity to comment on sulfide precipitation and its refusal to permit Petitioners to supplement the administrative record compounded the error. Without the benefit of Petitioners' comments on sulfide precipitation the court was in no position to determine whether that technology was simply an

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[17] For example, the court said: "We do not think it disqualifying that the Ashio plant, for example, uses sulfide precipitation to produce an end-product rather than to clean its wastewater, so long as the process adequately reduces pollutant concentrations in wastewater." App. 17a. For a number of technical and production reasons, Petitioners certainly found it "disqualifying" but were not allowed to alert EPA or the court.

[18] These comments and complaints demonstrated that the six proposed technologies were not appropriate for the specific limits in the regulations. Rather than acknowledge the comments, the Agency rejected all Petitioners' data and invoked a new technology to justify its preconceived limits.

incidental supplement to "lime, settle and filter," as EPA contended; whether it could achieve the prescribed effluent limits; and whether the use of the technology in other industries could be validly transferred to the U.S. nonferrous metals industry.[19] In short, the Court deprived itself of a record upon which to make a reasoned and informed judgment.

The effect of the decision is to impose significant burdens on those who wish to comment on proposed regulations. It allows an agency to fulfill the APA notice requirement merely by including material in the voluminous Development Document or anywhere else in the record. This allows (using the words of the court below) ambushing those who have not addressed all the items described therein. It frustrates and precludes meaningful comments in the rulemaking process. It also increases the costs for those who wish to participate in informal rulemaking proceedings since the entire record becomes subject to comment, regardless of what is specified in the Federal Register notice.

II

THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

The decision below, in its interpretation of "logical outgrowth," conflicts with those of other circuit courts. As noted *supra*, the court below has deemed that a substantial change in a proposed rule induced by comments or criticisms meets the "logical outgrowth" test.

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[19] See App. 16a-17a where the court makes specific findings with regard to technical and process matters presented in the EPA brief.

Decisions in the District of Columbia Circuit and even within the Fourth Circuit have reached contrary conclusions. Recently the D.C. Circuit stated that as "a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having vowed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. This notice necessarily must come—if at all—from the agency." *American Federation of Labor and Congress of Industrial Organizations v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985), citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549 (emphasis in original). In the instant case, the court blindly approved EPA's promulgation of a substantially new regulation which was not even based on a new comment, but rather on the Agency's internal determination that the six proposed technologies were not appropriate.[20] See App. 70a-73a. It also introduced the element of the Agency's good faith (App. 14a), which is irrelevant to the issue of notice and is not a legal substitute for it.

The decision below also conflicts with the recent Fourth Circuit *Chocolate Manufacturer Ass'n v. Block* decision. 755 F.2d 1098 (4th Cir. 1985). In that case, the agency proposed regulations concerning the sugar content of Federally funded food packages. Flavored milk and its sugar content was not placed in issue by the proposed rule. However, in response to comments, flavored milk was deleted from the program because of its high sugar content.

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[20] See also *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) ("the Agency's final conclusions are far from the 'logical outgrowth' of the preceding notice and comment process").

The court there recognized an agency may promulgate a final rule different from the proposal, but when the final rule substantially departs from the proposed rule, the notice is inadequate. It noted at the time of proposal the public could not have had any indication that flavored milk was at issue, and the very detailed and specific information in the preamble to the proposed rule did not address it. In striking down the final rule, the *Chocolate* court specifically addressed the "logical outgrowth" rule (755 F.2d at 1105-1106). The court said it did not feel the petitioner was "fairly treated or that the administrative rulemaking process was well served by the drastic alteration of the rule without an opportunity for CMA to be heard." *Id.* at 1106. The court below did not even attempt to distinguish the *Chocolate* decision, and only cited the case for the general proposition that an agency may promulgate a final rule that differs in some particulars from its proposals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES R. WALPOLE
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No. 85-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,
AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288 (L)

Kennecott,
Petitioner,
versus
United States Environmental Protection Agency,
Respondent.
GTE Products Corporation,
Intervenor/Petitioner.

No. 84-1479

American Mining Congress,
AMAX, Inc., and ASARCO Incorporated,
Petitioners,
versus
United States Environmental Protection Agency,
Respondent.

No. 84-1487

St. Joe Minerals Corporation,
Petitioner,
versus
United States Environmental Protection Agency,
Respondent.

No. 84-1659

The Secondary Lead Smelters Association,
Petitioner,

versus

William Ruckelshaus, Administrator,
United States Environmental Protection Agency,
Respondent.

Gulf Coast Lead Company,
Intervenor/Petitioner.

No. 84-1694

Mallinckrodt, Inc.,
Petitioner,

versus

United States Environmental Protection Agency,
Respondent.

On Petition for Review of an Order of the Environmental Protection Agency.

Argued: October 9, 1985 Decided: December 26, 1985

Before PHILLIPS, MURNAGHAN and WILKINSON, Circuit Judges.

James R. Walpole (Susan L. Smith; Holland & Hart on brief); Robert A. Emmett (Reed, Smith, Shaw & McClay on brief); Kurt E. Blase (Edwin H. Seeger; Richard T. Witt; Prather, Seeger, Doolittle & Farmer; Paul D. Frohardt; Holland & Hart; Douglas E. McAllister, Assistant Chief Counsel, American Mining Congress on brief) for Group I Petitioners; Robert N. Steinwurtzl (Stephen E. Roady; Mary Douglas Dick; Brown, Roady, Bonvillian & Gold, Chartered on brief) for Group III Petitioners; Theodore L. Garrett (Laird Hart; Covington & Burling on brief) for Group IV Petitioners; Michael W. Steinberg, U. S. Department of Justice; Steven E. Silverman, Office of General Counsel, U. S. Environmental Protection Agency (F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Division; Dean K. Dunsmore; Scott Slaughter; U. S. Department of Justice; Ellen Siegler; Office of General Counsel, U. S. Environmental Protection Agency; Susan G. LePow, Assistant General Counsel, U. S. Environmental Protection Agency on brief) for Respondent.

WILKINSON, Circuit Judge:

Petitioners challenge the effluent limitations set by the Environmental Protection Agency for the non-ferrous metals manufacturing industry. EPA established the limitations in a rulemaking pursuant to the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982).[1] Congress passed the Clean Water Act as an amendment to the Federal Water Pollution Control Act of 1972. The amendment pre-

---

[1] The challenged regulations are codified at 40 C.F.R. § 421 (1985).

serves the fundamental purpose of the 1972 Act: "[t]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. In setting effluent limitations for the non-ferrous metals industry, EPA acted to implement this congressional mandate to clean up the nation's navigable waterways. We have reviewed with care petitioners' challenges to these regulations. We conclude, however, that EPA has properly discharged the task it is required by Congress to perform.

I.

The instant action reflects the tensions recurrent in every case of environmental regulation. The first group of petitioners here produce substantial amounts of the country's primary copper, lead, and zinc. Others recycle discarded lead batteries for a variety of uses, and still another produces columbium-tantalum, of importance to the aerospace, energy, and transportation industries. The industries contend that the effluent limitations adopted by EPA in the name of the Act are unachievable and will impose widespread costs upon the industries themselves and upon those who depend for their economic livelihood upon nonferrous metals use.

EPA in turn states that petitioners discharge massive amounts of pollutants, over 3 million pounds annually, including "some of the most toxic metals found in industrial waste streams . . . lead, cadmium, arsenic, antimony, and zinc." It contends these pollutants create "a variety of serious adverse health and environmental effects, including cancer, brain damage, and kidney failure." The effluent limits are, in EPA's view, based upon achievable technologies and must be met promptly to fulfill the basic purposes of the Clean Water Act.

The record in this case is voluminous. The rulemaking itself is highly technical. Petitioners have challenged EPA's choice of data, its statistical methods, and its economic

analysis. It is something of an understatement to say that the expertise of the parties with regard to the non-ferrous metals industry exceeds that of this court. Without suspending our critical faculties, we nonetheless believe that the benefit of the doubt in the battle of the data belongs to the agency in which Congress has reposed responsibility for administration of the Act, *see* 33 U.S.C. § 1251(d). In addition, this court is bound by the general rules of deference that run throughout administrative law. We may not overturn the agency's judgment simply because we might have drafted different regulations; remand is limited to those cases in which the agency has acted without reasonable basis. *American Meat Inst. v. EPA*, 526 F.2d 442, 450 (7th Cir. 1975).

We begin with the philosophy of the Clean Water Act. The Act requires EPA to set effluent limitations for industries in two stages. As a preliminary matter, Congress asked EPA to set limits based on the "best practicable control technology currently available" (BPT). 33 U.S.C. § 1311(b)(1)(A). EPA defines BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory. This average is not based upon a broad range of plants within an industrial category or subcategory, but is based upon performance levels achieved by exemplary plants." *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 76 n.15 (1980), quoting 39 Fed. Reg. 6580 (1974).

In the second stage, Congress directed EPA to set an even more stringent standard, basing effluent limitations on the "best available technology economically achievable" (BAT) for an industrial category. 33 U.S.C. § 1311(b)(2)(A)(C)(D) and (F). The BAT standard reflects the intention of Congress to use the latest scientific research and technology in setting effluent limits, pushing industries toward the goal of zero discharge as quickly as possible. In setting BAT, EPA uses not the average plant, but the optimally operating plant, the pilot plant which acts as a

beacon to show what is possible. *See A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. (Comm. Print 1973), at 798 (hereinafter "Leg. Hist."). "The distinction between 'best practicable' and 'best available' is intended to reflect the need to press toward increasingly higher levels of control. . . ." Leg. Hist. at 170.

For the purposes of this case, the non-ferrous metals industry was generally subject to BAT requirements. Defining Best Available Technology requires substantial technical expertise in evaluating both the efficiency of advanced technologies and the adaptability of those technologies to the production processes of the companies in this case. Our review of the EPA rulemaking is appropriately cautious. As this court has previously noted, "The scope of our review is further colored by the policy of the Clean Water Act and the sophisticated data evaluations mandated by that lengthy and complicated statute. . . . Further, technological and scientific issues, such as those presented in this case, are by their very nature difficult to resolve by traditional principles of judicial decisionmaking." *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 558-59 (4th Cir. 1985).

We proceed, however, on the understanding that Best Available Technology was the means chosen by Congress to achieve "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," 33 U.S.C. § 1251(a)(1), a goal that implies some urgency to the environmental task that Congress set. While Congress was careful to require agency consideration of such factors as the cost to industry of achieving appropriate effluent reductions, it left EPA some latitude in defining BAT, permitting in addition to enumerated criteria, the consideration of "such other factors as the Administrator deems appropriate." *See* 33 U.S.C. § 1314(b)(2)(B).

To achieve a reasoned result in a dispute over technologies, EPA is bound to consider industry data, but it is not bound to accept it. Any other resolution would undermine the integrity of agency decision-making. For obvious reasons, this court should be loathe to compel an agency to accept data submitted by a regulated industry. That does not imply we are blind to the capacities of agencies to enthrone their own agendas and dismiss contending views. In considering petitioners' challenges to the non-ferrous metals rulemaking, we ask whether EPA's technical judgments find support in the record and whether they reflect the rule of reason, not the imposition of fiat.

The deference to the technical expertise of the Administrator supplements the deference generally required of courts reviewing administrative actions. The Administrative Procedure Act (APA) specifies that a court may overturn an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court best acts as a check on agency decisionmaking by scrutinizing process and by determining whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Whether the agency has provided notice and an opportunity to comment, and has fairly considered all significant data and comments, is the heart of the judicial inquiry. *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985). Once the agency has been found to follow the prescribed course of procedure, its "choice of scientific data and statistical methodology" is entitled to respect. *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 657 (3rd Cir. 1983), *rev'd on other grounds sub nom. Chemical Mfrs. Ass'n v. NRDC*, ___U.S. ___, 105 S.Ct. 1102 (1985).

EPA did not approach casually the task of non-ferrous metals rulemaking. In 1977, the agency began gathering data for the proposed rules which it published on February

17, 1983. 48 Fed. Reg. 7032-7126. Data was obtained from plant visits, plant samplings, studies of scientific journals, and consultations with industry. Three hundred and nineteen firms, operating 416 facilities, received questionnaires from EPA asking for information on flow rates, production rates, wastewater treatment, and costs. *Id.* at 7044. Each plant visited by EPA also received an opportunity to comment on the trip report prepared by the agency. Various of the petitioners met with EPA both before and after publication of the proposed rules.

The resulting record ran 24,000 pages. EPA solicited public comment on all aspects of the regulations, highlighting points on which the agency wanted additional information. *Id.* at 7073. The initial comment period lasted eleven weeks. EPA reopened the comment period twice and accepted late-filed comments from one of the petitioners. 48 Fed. Reg. 50906 (Nov. 4, 1983); 48 Fed. Reg. 52604 (Nov. 21, 1983).

The agency considered the comments and contacted each petitioner with follow-up inquiries. The comments led EPA to re-examine its selections of model technologies and data bases. EPA likewise considered additional data on the treatment of lead and ammonia, as well as continuing to request and evaluate data from plants that had not previously submitted data. The long process of gathering data and the ongoing dialogue with the industry culminated in the final rule promulgated March 8, 1984.

We do not imply, in detailing this lengthy consideration, that a matter of the magnitude and complexity of nonferrous metals rulemaking deserved anything less. We note only that an appellate court cannot be oblivious to the expenditure of effort that preceded its consideration and that, if the process has been a fair one, a time does come when rulemaking may cease and compliance must commence.

II.

For the purposes of this appeal, petitioners have been grouped according to industry. The first group of petitioners are Kennecott, American Mining Congress, AMAX, Inc., ASARCO Incorporated, St. Joe Minerals Corporation, and GTE Products Corporation (hereinafter "Kennecott"). Together these companies are responsible for much of the United States production of primary copper, primary lead and primary zinc. Their plants process ore mined from the ground to produce the primary base metals.

Kennecott objects to the non-ferrous metals rulemaking, arguing that the agency's data base was flawed, that petitioners were not given the opportunity to comment on part of the model technology, sulfide precipitation, and that EPA incorrectly calculated flow allowances. After carefully considering petitioners' numerous and specific objections, we have concluded that EPA acted within the bounds of its discretion when it set effluent limits for the primary metals industry.

A.

When it set effluent limits for the primary metals industry, EPA used as its model technology a waste treatment process called lime, settle and filtration (L,S&F). Briefly, this treatment technique works in the following way: adding lime to wastewater increases the pH; it makes the wastewater more alkaline. At different pHs, different metals precipitate, that is, emerge from solution and become suspended as solids in the wastewater. Eventually, most solids settle at the bottom of the tank. The precipitate can then be disposed of separately from the wastewater. The wastewater is often subsequently filtered through coal or sand in order to remove additional suspended solids.

A number of industries use lime and settle. Beginning in the late 1970's, EPA collected data from six such industries (aluminum forming, battery manufacturing, secondary lead, coil coating, copper forming, and porcelain enameling). After deleting unreliable data, EPA compiled the Combined Metals Data Base (CMDB). The agency then used the CMDB to calculate achievable effluent limitations for several related industries, including the primary base metals industry.

Kennecott objects to EPA's use of the CMDB. It argues that the CMDB data was limited, that the wastewaters of CMDB plants differed significantly from those of the primary metals plants, and that EPA should not have rejected data submitted by the primary metals industry.

Kennecott's basic objection is that EPA used data from the waste treatment systems of other industries (the CMDB) rather than using data submitted by the primary metals industry. Specifically, Kennecott makes the following argument: EPA's data base was limited, containing only 300 raw and treated data points from nineteen plants. EPA did not obtain samples from any given plants over a long term; therefore, the data cannot accurately reflect long-term performance. Kennecott contends that long-term data is necessary because fluctuations in pollutant concentrations occur even in properly operated treatment facilities due to "seasonal changes in temperature and precipitation, production surges or slow downs" and other variables. Because EPA did not collect enough samples, over a long enough period of time, Kennecott contends that the data does not accurately reflect achievable concentrations. Therefore, Kennecott says, petitioners will not be able to meet the effluent limitations.

In response, EPA notes that courts customarily defer to an agency's choice of data, and that in any case, EPA could use the CMDB to predict long-term performance accurately. On the first point, the agency is indisputably

correct. This court has consistently given EPA a reasonable leeway in its selection of data and statistical methods. *FMC Corp. v. Train,* 539 F.2d 973, 986 (4th Cir. 1976). "[W]e note that an agency's data selection and choice of statistical methods are entitled to great deference . . . and its conclusions with respect to data and analysis need only fall within a 'zone of reasonableness'." *Reynolds Metals,* 760 F.2d at 559 (citations omitted). The question is thus whether EPA acted reasonably in basing effluent limitations for the primary base metals industry on the CMDB.

EPA contends that it does not necessarily need long-term data to predict long-term performance. It notes that the data base at issue here has been used in regulations in a number of other metals industries. By using well-established statistical methods, EPA could factor in the variability one would expect in an optimally operating plant. It is true that prediction of long-term performance would not account for fluctuations resulting from operational failures. However, the agency argues that plants with operating problems do not represent the Act's goal of Best Available Technology. *FMC Corp. v. Train,* 539 F.2d at 986. ("The purpose of these variability factors is to account for the routine fluctuations that occur in plant operation, not to allow for poor performances.") Moreover, the agency contends that the addition of second-step sulfide precipitation to the model technology further reduces the variability of lime and settle treatment. *See* subsection IIB, *infra.* Courts have traditionally respected the agency's selection of a data base in the face of challenges that the data failed to account for variable pollution loads, *Ass'n of Pac. Fisheries v. EPA,* 615 F.2d 794, 812-13 (9th Cir. 1980); *American Petroleum Inst. v. EPA,* 540 F.2d 1023, 1035-36 (10th Cir. 1976). The number of data points here is not insignificant, and there must exist some reasonable termination point in the process of data collection.

Kennecott responds that even if EPA collected a sufficient number of data points, the CMDB remains flawed.

It argues that the CMDB wastewater is so different from the wastewater in the primary metals industries that EPA cannot use the CMDB to set effluent limits that would apply to Kennecott. Without quantifying its claim, Kennecott says that the base metals industry has "huge amounts of wastewater," "tremendously high concentrations of metals," and a "very large variety of different metals" in the wastewater. EPA's similarly unquantified response is that the wastewaters in the CMDB industries and those of the primary base metals industry are indeed comparable. The agency agrees that the differences in concentration of metals may be statistically significant. However, there is evidence to show that the treatability of wastewater depends on the solubility of the pollutants, not on their concentrations. A difference in concentration of influents would thus not affect the concentration of effluents. *See* Proposed Rules, 48 Fed. Reg. 7050 (Feb. 17, 1983). This judgment constitutes a reasonable basis for EPA's belief that the wastewaters are comparable. We cannot say that EPA has acted arbitrarily or capriciously in using the CMDB to set effluent limitations for the primary metals industries.

Finally, we do not believe that EPA acted arbitrarily in rejecting the data submitted by the industry. EPA examined the data from petitioners' plants and concluded that six of the plants were not operating properly, and the seventh was unrepresentative. EPA determined that three plants were improperly operating one or more steps of the lime and settle process; they had ineffective pH adjustment, inadequate wastewater settling time, or lacked wastewater equalization. Plants use equalization to send more uniform loads of pollutants to the treatment system, ensuring that the system is not overloaded. In three other plants, patterns of extreme variability in treated effluents suggested to EPA that the plants were not equalizing their wastewaters properly. Finally, EPA considered that the seventh plant was unrepresentative because nearly all of

its wastewater came from sources not related to the manufacturing processes covered by these regulations. We cannot say, therefore, that EPA abused its discretion by rejecting the industry data.

B.

EPA had originally proposed lime, settle and filtration as the BAT for treating wastewater in the primary base metals industry. Commenters objected that they would not be able to meet the proposed effluent limitations. In the Final Rules, EPA responded that any plant unable to meet the effluent limitations by using the model lime, settle and filtration technology could add an additional step: sulfide precipitation. While the APA requires the opportunity for public participation in rulemaking, "[t]here is no question that an agency may promulgate a final rule that differs in some particulars from its proposal." *Chocolate Manufacturers*, 755 F.2d at 1103-04. Kennecott objects, however, to the inclusion of sulfide precipitation on the grounds that it was not given notice or the opportunity to comment. Had it been given the opportunity, Kennecott says, it would have filed comments detailing the reasons that sulfide precipitation would not reduce effluent concentrations to the required levels.

Sulfide precipitation works on the same principle as lime and settle. When sulfide is added to wastewater, certain pollutants precipitate out and become suspended as solids in the wastewater. The wastewater is held in tanks until most of the precipitated metals have settled to the bottom. Filtration will remove additional suspended solids. When sulfide precipitation precedes L,S&F, it is called "sulfide pretreatment." When sulfide precipitation follows L,S&F, it is called "sulfide polishing."

Kennecott charges that EPA gave no indication that it was considering using lime, settle and filter plus sulfide precipitation as the model technology. An agency is, of

course, required to give notice "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking." *Chocolate Manufacturers*, 755 F.2d at 1104. EPA listed six control and treatment options in the proposed rules; sulfide precipitation was not among them. We note, however, that the agency is not required to specify every precise proposal that it may eventually adopt as a rule, *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 248 (4th Cir. 1979). EPA actually did discuss sulfide precipitation in the Development Document, which accompanied the Proposed Rules, although Kennecott contends that these brief references were insufficient to give notice, buried as they were amidst a discussion of two dozen other treatment technologies. As a result, Kennecott believes it was deprived of notice and the opportunity to comment on sulfide precipitation.

EPA would characterize the sequence of events here differently: EPA proposed limits, the primary metals industry commented that it would not be able to meet those limits, and EPA added another treatment step so that plants could more readily comply with the established effluent guidelines. EPA styles its introduction of sulfide precipitation a "natural and logical outgrowth" of the commenting procedure. *Cf. BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied sub nom. Eli Lilly & Co. v. Costle*, 444 U.S. 1096 (1980). This description of events may, of course, mask a displeasing side of agency behavior. It is not acceptable for an agency to set unachievable limits, and then, when the industry objects, to pull a curative technology out of its hat. This sort of conduct would frustrate the purpose of the procedural safeguards in the administrative process, and replace participatory rulemaking with rulemaking by ambush.

The question of adequate notice requires "careful consideration on a case-by-case basis." *BASF Wyandotte*, 598 F.2d at 642. Here, there is no indication that EPA acted in bad faith and there is ample indication that the base metals

industry should reasonably have known that EPA was considering sulfide precipitation. In the preamble to the proposed rules, EPA specifically asked for comments on alternative treatment technologies. In the associated Development Document, EPA included both lime and settle and sulfide precipitation in its discussion of effective chemical precipitation methods. EPA also discussed the advantages and limitations of sulfide precipitation in some detail. Finally, the Development Document contained several charts on sulfide precipitation, including data on the performance of sulfide precipitation-sedimentation systems and a comparison of the solubilities of hydroxides and sulfides of selected metals.

Just as an agency may not ambush an industry by withholding a proposed technology until after the period for comment, an industry may not remain silent during that period only to complain upon appeal that it was deprived of an opportunity to comment on what it might reasonably have been apprised. This circuit has also noted that while an agency may not bootstrap new technologies from the comments, it may make "substantial changes" in its original proposed rule if the changes are a "logical outgrowth" of the original proposal and the notice and comments upon it. *American Paper Inst. v. EPA*, 660 F.2d 954, 959 n.13 (4th Cir. 1981). Accordingly, we hold that EPA did not violate the requirements of the Administrative Procedure Act when, in an attempt to respond to industry comments and complaints, it added sulfide precipitation as a supplement to the Best Available Technology on which its effluent limitations were grounded.

There remains the question of whether EPA acted arbitrarily in selecting sulfide precipitation as part of the Best Available Technology. Kennecott argues that sulfide precipitation will not reduce effluent concentrations to the required levels. Specifically, Kennecott charges that data from the model plants which currently use sulfide precipitation (Ashio, Japan; Boliden, Sweden; AMAX Ft. Madi-

son) cannot be used to predict achievable concentrations at Kennecott's plants, because conditions at the two groups of plants are so different. Kennecott notes that the plant in Ashio, Japan, for example, uses sulfide precipitation to produce arsenic trioxide as an end-product, rather than to treat wastewater. EPA replies that the ultimate disposition of the solid precipitate is irrelevant, as long as the concentration levels of pollutants in the wastewater are acceptable.

The model technology may exist at a plant not within the primary base metals industry. Congress contemplated that EPA might use technology from other industries to establish the Best Available Technology. *Reynolds Metals*, 760 F.2d at 562. Progress would be slowed if EPA were invariably limited to treatment schemes already in force at the plants which are the subject of the rulemaking. Congress envisioned the scanning of broader horizons and asked EPA to survey related industries and current research to find technologies which might be used to decrease the discharge of pollutants. Leg. Hist. at 170.

To determine that technology from one industry can be applied to another, the agency must:

> (1) show that the transfer technology is available outside the industry;
>
> (2) determine that the technology is transferable to the industry;
>
> (3) make a reasonable prediction that the technology if used in the industry will be capable of removing the increment required by the effluent standards.

Tanner's Council of America, Inc. v. Train, 540 F.2d 1188, 1192 (4th Cir. 1976) (using the standard set out by the Eighth Circuit in *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1048 (8th Cir. 1975).

EPA has demonstrated that sulfide precipitation—a process it terms "familiar" and "well established"—is available outside the primary base metals industry and that the technology is transferable to that industry. The agency notes that "the low solubility of metal sulfides" has made sulfide precipitation a more effective treatment than the conventional lime and settle process. We do not think it disqualifying that the Ashio plant, for example, uses sulfide precipitation to produce an end-product rather than to clean its wastewater, so long as the process adequately reduces pollutant concentrations in wastewater. Again, granting the agency a proper measure of deference in technical judgments, it was not arbitrary for EPA to decide that sulfide precipitation would remove pollutants to the degree required by the effluent limitations.

Kennecott discusses two other differences between the sulfide precipitation process at the model plants and the process at the primary base metals plants. Kennecott points that the Ashio plant treats wastewater in batches, while the primary base metals plants treat wastewater continuously. EPA answers that the choice of the batch or continuous processes affects only cost, not effectiveness, and that study demonstrates the installation and operation of sulfide precipitation is economically achievable.

Kennecott also notes that all three model plants use sulfide pretreatment, rather than sulfide polishing. Again, EPA believes that the difference is irrelevant; whether sulfide precipitation is the step before or after L,S&F will not affect the achievability of the desired effluent limitations. The critical matter, in the agency's judgment, is the application of the proper amount of precipitant and the maintenance of proper levels of pH, factors entirely independent of the timing of wastewater treatment.

We hold that EPA had a reasonable basis for deciding that the sulfide precipitation technology is transferable. We are unable to conclude the agency acted arbitrarily or

capriciously in selecting sulfide precipitation as part of the Best Available Technology for the primary base metals industry.

C.

EPA expresses its effluent limitations as "mass limits." EPA derives the mass limit by multiplying the maximum concentration level of a pollutant times water flow. The agency sets flow allowances as well as concentration limits in order to prevent plants from avoiding "the regulatory impact by diluting their effluent." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1059 (D.C. Cir. 1978). In setting flow allowances, the agency uses a "building block approach." That is, EPA sets a flow allowance for each individual process step; the state or regional permit writer then calculates the total flow allowance for each individual plant by summing the allowances for each process step used at that plant.

Kennecott contends that EPA improperly denied a flow allowance for a step in the process of manufacturing primary lead called blast furnace slag granulation. In the final rules, the BAT standard for blast furnace slag granulation is zero discharge. The New Source Performance Standard (NSPS), which governs new plants, is also zero discharge. Because Congress thought that new plants have the opportunity to install the best and most efficient production processes, NSPS is normally at least as stringent as, if not more stringent than, BAT. *American Iron and Steel Inst. v. EPA*, 526 F.2d 1027, 1058-59 (3d Cir. 1975). Obviously, nothing can be more stringent than zero discharge.

The blast furnace slag granulation step can be either a wet or a dry process. Kennecott contends that dry slag is not an option because it produces uncontrollable dust. Therefore, plants use wet slag, which produces wastewater. Kennecott requests a flow allowance for this waste-

EPA responds that zero discharge for blast furnace slag granulation is appropriate because three of four existing plants recycle 100 percent of their wastewater and thus achieve zero discharge for reasons which are not site-specific. The agency did not abuse its discretion in concluding that no flow allowance need be set for the blast furnace slag granulation process step.

With regard to the NSPS, Kennecott lodges one additional objection. It says that the NSPS is based on pyrometallurgical plants, but that new primary lead smelters are likely to be hydrometallurgical. Kennecott admits that no hydrometallurgical plant is in the process of being built or even contemplated. When such a plant is built, it can be designed according to EPA specifications. If zero discharge is indeed impossible for a hydrometallurgical plant, EPA has said that at that time, it will receive a petition for a new rulemaking. 48 Fed. Reg. 8764 (Mar. 8, 1984).

D.

On occasion, EPA sets catastrophic storm allowances. These allowances permit a plant to discharge additional wastewater under emergency circumstances. Some plants hold liquid waste in "surface impoundments," which are simply natural or manmade depressions. A catastrophic storm allowance permits a plant to discharge untreated wastewater when a storm of a certain size strikes and causes the surface impoundment to overflow. EPA has set no catastrophic storm allowances for primary lead and zinc plants. Copper smelters are permitted to discharge untreated wastewater if a "twenty-five year storm" occurs. A twenty-five year storm is a storm of such magnitude that it is likely to occur only once per quarter century.

Kennecott can no longer challenge the catastrophic storm allowances for zinc and copper. EPA denied the catastrophic storm allowance for zinc in a 1975 rulemaking; the BAT and BPT allowances for copper were set in 1975

and 1980. *See* 40 Fed. Reg. 8528 (Feb. 27, 1975); 40 Fed. Reg. 8524 (Feb. 27, 1975); 45 Fed. Reg. 44929 (July 2, 1980). Petitioners failed to raise their objections within the ninety days specified by the Clean Water Act. 33 U.S.C. § 1369(b)(1).

Kennecott is free to challenge the denial of a storm allowance for the primary lead industry, but we do not find its arguments persuasive. EPA did not set a catastrophic storm allowance for primary lead plants because surface impoundments are not part of the model technology. 48 Fed. Reg. 7048-49 (Feb. 17, 1983). EPA made a conscious decision to discourage impoundments because of associated problems: the risk of groundwater contamination and the danger that heavy pollutants will be discharged all at once. Given EPA's reservations about impoundments and the fact that impoundments are not part of the model technology, EPA did not act arbitrarily in refusing to grant an allowance for catastrophic storms.

EPA also did not set allowances for non-scope flows, that is, wastewater which is not generated by the manufacturing process but comes from other sources like employee showers or handwashing. The preamble to the Final Rules asks permit writers to consider non-scope flows when they write permits for individual plants. 47 Fed. Reg. 8778 (March 8, 1984). Kennecott is concerned that because EPA does not specifically authorize allowances for non-scope flows in the body of the regulations, permit writers will erroneously deny allowances. However, EPA did not set allowances for non-scope flows because these flows are so idiosyncratic. We do not believe that EPA was required to list site-specific sources as a separate subpart of the final regulations. Individual plants will, of course, be able to challenge the flow allowances set by permit writers.

E.

Finally, Kennecott says that it was denied notice and the opportunity to comment on the Pretreatment Stand-

ards for Existing Sources (PSES) BAT applies to plants which are "direct dischargers," that is, plants whose wastewater goes directly into the waterways. Indirect dischargers are plants which discharge waste which is treated by a sewage plant before it reaches public waterways. Indirect dischargers are subject to PSES, rather than to BAT. Because many pollutants either pass through or interfere with the operation of sewage treatment plants, EPA frequently sets PSES equal to BAT.

EPA failed to propose PSES for the primary zinc and lead subcategories because it did not realize there were any indirect dischargers. When EPA learned from the comments that there were indirect dischargers, EPA set PSES equal to BAT. Because EPA had previously disclosed its methodology for establishing BAT, and because it was foreseeable that PSES would be the same as BAT, we cannot say that EPA failed to provide adequate notice.

III.

The next petitioners represent the secondary lead industry, which recycles lead, principally from discarded batteries, in four steps. First the batteries are cracked, then the various parts are separated or "classified" by immersing the battery parts in water. In this step, for example, plastic and rubber are separated from the lead plate. In the third process step, the lead which has been removed from the batteries is smelted. Plants use wet air pollution control systems ("scrubbers") to control the emission from smelting. Finally, the lead is refined and cast. At this stage, plants often use another wet air pollution system, "kettle scrubbers." Each of these process steps results in a wastewater stream contaminated by lead and other pollutants.

The Secondary Lead Smelters Association (SLSA) represents eighty-five percent of U.S. secondary lead smelting capacity. SLSA has challenged the non-ferrous metals rule-

making, arguing that filtration is not economically achievable, that EPA's data base was flawed, and that EPA incorrectly set flow allowances. We have considered its objections and conclude that SLSA has failed to show that EPA acted arbitrarily or capriciously in setting effluent limits for the secondary lead industry.

A.

EPA used multimedia filtration as the last step in the combination of techniques which represent BAT for the secondary lead industry. SLSA contends that multimedia filtration is not economically achievable, and that EPA has already considered and rejected filtration in rulemakings for five other industries.

According to SLSA, EPA significantly underestimated the total cost of filtration by failing to include the costs of larger treatment facilities and remodeling. In its Economic Development Document, EPA considered the possible adverse economic impacts of filtration, including possible plant closures, loss of business to foreign competition, increased cost of production, decreased return on investment, and rising unemployment. This court will not undertake its own economic study, but must uphold the regulations if EPA has established in the record a reasonable basis for its decision. Courts generally allow EPA some leeway in its analysis of costs. *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1238 (10th Cir. 1979); *BASF Wyandotte*, 598 F.2d at 656. Here we must find that EPA has built a record sufficient to support its decision that multimedia filtration is economically achievable.

It is true that EPA has not required filtration for other industries. It is well settled, however, that such inter-industry comparisons are not determinative. *American Meat Inst.*, 526 F.2d at 466; *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 389 (D.C. Cir. 1973). The question is whether filtration should be required for the secondary

lead industry, not whether it should be required for some other industry. As the District of Columbia Circuit has noted: "It would be unmanageable if, in reviewing the cement standards, the court should have to consider whether or not there was a mistake in the incinerator standard, with all the differences in parties, practice, industry procedures, and record for decision." *Id.* at 389. This court does not have before it the records of the rulemakings for the five other industries; we are, therefore, reluctant to launch comparisons of model technologies established for one industry with those established for another.[2]

The cost of installing and operating a model technology is not, however, a matter that Congress has permitted the agency to ignore. The statute requires EPA to take into account the cost of achieving effluent reduction. 33 U.S.C. § 1314(b)(2)(B). Furthermore, the agency has the duty to explain its cost analysis fully. *Pacific Fisheries*, 615 F.2d at 820.

Here, EPA did execute a careful analysis of compliance costs and their economic impact. The agency used data from the secondary lead industry to estimate the production and capacity of each plant, and then computed probable revenues from those production and capacity figures. Taking into account wastewater flows and treatment technology already in place, the agency calculated compliance costs for each plant in the secondary lead industry. EPA

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[2] The fact that the agency may undertake such comparisons in establishing BAT for a particular industry poses no anomaly. As we have noted, such comparisons are consistent with the agency's statutory mandate and, in any event, the agency must establish transferability. See section IIB, *supra*.

Moreover, we discern a difference in terms of the statutory purpose between an industry pleading comparisons as a basis for the most lenient effluent guidelines and the agency utilizing comparisons in assessing the Best Available Technology.

next compared compliance costs to revenues for each plant. If the compliance costs exceeded one percent of the revenues, EPA went on to determine whether the plant could remain profitable in the long run, and whether it could absorb the necessary costs during the first few years of compliance.

EPA also calculated changes in cost of production, increase in price, and changes in return on investment, and compared compliance investment costs to average capital expenditures. On completion of its economic analysis, EPA concluded that no plants would be forced to close because of increased costs, and that the regulations would not have a significant adverse impact on employment, foreign trade or the secondary lead smelting industry. Recognizing the importance of this issue to those plants and businesses affected, we nonetheless conclude that EPA acted in accordance with its statutory mandate in assessing the costs of BAT compliance.

B.

SLSA's next request is that the effluent limitations for lead be remanded for consideration of additional data. Initially, EPA based the effluent limitations for lead on three data points from one battery manufacturing plant, Johnson Controls. EPA then added to its data base 201 points from an integrated battery manufacturing/secondary smelting facility, General Battery. SLSA argues that EPA was wrong to use this data, while rejecting data submitted by the industry. We find that EPA did not act arbitrarily with regard to its choice of data.

Specifically, SLSA claims that the wastewaters from the plants EPA used differ significantly from industry wastewater. SLSA says that secondary lead wastewater has higher concentrations of lead. Secondary lead raw wastewater contains 11-92 milligrams per liter of lead. The untreated wastewater at Johnson Controls contained

lead in concentrations of 1.0-1.45 mg/l. However, lead concentrations at General Battery ranged from 21-41 mg/l in the EPA sampling and 0.96-301 mg/l in the plant's self-sampling. We conclude that EPA was not unreasonable in basing its effluent limits on the General Battery data. Had EPA set limits using only the Johnson Controls data, we might well decide this question differently.[3]

EPA also acted within its discretion when it rejected data submitted by the secondary lead industry. EPA said that the data submitted by petitioners did not contain paired influent/effluent points or effluent pH ranges. As a result, EPA felt it was unable to determine whether petitioners' data represented exemplary operation. We cannot find that the agency's rejection of the secondary lead industry data on a matter committed to its expertise is unfounded or arbitrary.

C.

The question of whether the secondary lead industry can achieve cadmium limitations set for other industries is not ripe for review. EPA has not set cadmium limitations for the secondary lead industry. When EPA decides to forego general regulations in favor of having limits set by individual permit writers, the agency has made a considered decision to set particular limitations on a plant-by-plant basis. For this court to deal with the issue of cadmium limitations on appeal as if it were a general rulemaking matter would be to flout the agency's approach to the problem.

The requirement of ripeness is designed "to protect agencies from judicial interference until an administrative

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[3] The agency's euphemistic assertion, without accompanying figures, that Johnson Controls' wastewater "contained lead at concentrations comparable to the lower end of the range of secondary lead plants" is not appreciated. Such representations serve to obscure, not to clarify.

decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). In determining whether a challenge to an administrative regulation is ripe for review, the court must ask first whether the issue is appropriate for judicial resolution, and second whether the parties will suffer hardship if judicial review is denied. *Id.* at 149.

Here the matter we are asked to review is doubly speculative. We do not know whether the individual permit writers will choose to regulate cadmium at all. Further, it is unclear that a permit writer who does choose to set limits for cadmium will do so by applying standards from other industries to particular secondary lead plants. *Cf. NAMF*, 719 F.2d at 654-55.

The secondary lead industry will likewise suffer no real hardship as a result of this court's denial of judicial review at this juncture. If a permit writer does set cadmium limits for a secondary lead plant, the plant is free to seek review of the permit. *See Diamond Shamrock Corp. v. Costle*, 580 F.2d 670 (D.C. Cir. 1978). Given the double contingency, and the fact that secondary lead smelting plants enjoy an avenue of relief in the event of future injury, we decline to address this matter in the present litigation.

D.

SLSA's next contention is that EPA erred when it set or failed to set flow allowances for the various steps in the secondary lead smelting process. As noted above, secondary lead smelters recycle batteries to produce lead in four steps: battery cracking, battery classification, smelting, and refining. During smelting, plants use furnace wet air pollution control. The refining process produces particulate matter, which is controlled by a kettle wet air pollution control system. Each process step produces a wastestream. Some plants recycle most, if not all, of the

wastewater produced by the battery classification process and the two air pollution control processes. EPA did not set a flow allowance for the battery classification process step. SLSA challenges this lack of flow allowance, and, in addition, challenges as too low the flow allowances for the battery cracking process step, furnace wet air pollution control, and kettle wet air pollution control. We find that EPA's decisions as to flow allowances were not arbitrary or capricious, and uphold the regulations.

EPA did not set a flow allowance for battery case classification because it had obtained data from plants which reuse 100 percent of the wastewater from this process step. SLSA contends that recycling wastewater "dirties" equipment, necessitating continuous maintenance. Congress, however, required EPA to search out the Best Achievable Technology, and to strive for zero discharge. Two secondary lead plants recycle 100 percent of their battery classification wastewater by running it through lime, settle and filtration. Since all secondary lead plants have a lime, settle and filtration system, EPA believes all secondary lead plants can achieve 100 percent recycle and zero discharge for battery classification. EPA thus did not act arbitrarily in denying a flow allowance for the battery classification process step.

SLSA also contends that the flow allowance for the battery cracking process step is too low. SLSA says that EPA wrongly excluded data from two plants, and based its data on plants with unrepresentatively low flows. According to EPA, twenty of the thirty-five plants with this wastestream currently meet the flow allowance limit set for battery cracking. EPA contends that it rejected data from two plants with excessively high flows, because it could find no technical justification for the high flows. The agency can reject data it reasonably believes to be unreliable. *American Meat Inst.*, 526 F.2d at 457. While it is not free to reject data arbitrarily, it may do so if it reasonably concludes that the plant is not operating effi-

ciently. The standard set by Congress is high; there is no room for data from plants which are not functioning optimally.

EPA also set comparatively low flow allowances for both kettle and furnace wet air pollution control systems. SLSA again argues that both low allowances are too low, and therefore not achievable by secondary lead smelters. Specifically, SLSA says that, in setting flow allowances for kettle scrubbers, EPA erroneously excluded data from two plants. EPA says that plants which use kettle scrubbers recycle the water used and then periodically discharge the water in order to flush out the system. EPA received data from three plants and used the lowest rate to set the flow allowance, after deciding that there was no technical justification for the two higher rates. We cannot say that EPA did not duly consider all the data, or that the agency acted unreasonably in setting the flow allowance on the basis of the best performance.

SLSA next objects that the furnace air pollution control flow allowance is too low. EPA received data from eight plants, but based the flow allowance on data from only three plants. Again, EPA's action was consistent with Congress' instruction to base effluent limitations on the Best Available Technology. Two plants recycle all of their furnace air pollution control wastewater. EPA based its flow allowance on a ninety percent recycle rate. We cannot say that EPA acted unreasonably in setting the flow allowance for furnace air pollution control systems.

In sum, EPA did not abuse its discretion in either setting or failing to set flow allowances for any of the steps in the secondary lead smelting process.

IV.

The last petitioner is Mallinckrodt, which produces columbium and tantalum salts. Columbium and tantalum are used in the aerospace, energy, and transportation indus-

tries. There are five companies in the United States which process columbium and tantalum. Three integrated plants process ore to make salts, and then process the salts to produce metal. Mallinckrodt processes raw material to make columbium and tantalum salts, which are then used by the fifth firm to make metal.

Mallinckrodt complains that EPA failed to provide adequate notice and opportunity to comment on the ammonia standards and on flow allowances. We find, however, that EPA did meet the notice and comment requirements. In addition, Mallinckrodt charges that EPA was arbitrary and capricious in promulgating rules on the basis of inadequate data. We find that EPA was neither arbitrary nor capricious, and accordingly deny Mallinckrodt's petition.

A.

Mallinckrodt uses a process known as "steam-stripping" to reduce the levels of ammonia in wastewater. EPA set effluent limitations for ammonia, using steam-stripping as the model technology. EPA based the ammonia concentration standard on data from a single plant in the iron and steel industry. In its comments, Mallinckrodt objected that the data was insufficient. In connection with a related rulemaking, EPA had obtained data from a zirconium-hafnium plant that also used steam stripping. EPA examined the zirconium-hafnium data to see what levels of ammonia concentration were achievable.

Mallinckrodt argues that EPA's failure to publish the data from the zirconium-hafnium plant deprived Mallinckrodt of the opportunity to comment. Had it been given the opportunity, Mallinckrodt says, it would have pointed out that Mallinckrodt's wastewater has significantly greater quantities of fluorides and sulfates than does the zirconium-hafnium wastewater. Mallinckrodt says that the fluorides and sulfates interfere with the ability of steam stripping to release ammonia, hence it will not be able to

achieve the effluent limitations based on the zirconium-hafnium data. According to EPA, however, the iron and steel data continued to be the basis for the final regulations; the zirconiun-hafnium data was used only to confirm the limits.

The requirement of notice and an opportunity to comment is designed to ensure that interested persons are apprised of the "subjects and issues" before the agency. *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 293 (3rd Cir. 1977). This requirement should not, however, be maneuvered to block enforcement of a regulation indefinitely. The case law establishes that an agency may promulgate a rule which differs from the proposed rule, without re-opening the comment period. "The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973). Were the law otherwise, rulemakings might never be terminated.

The reviewing court must in turn strike a balance between ensuring public participation and not obstructing the passage of valid regulations. "The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing." *BASF Wyandotte*, 598 F.2d at 642 (footnote omitted).

Had it been given the opportunity to comment on the zirconium-hafnium data, Mallinckrodt would have discussed fluoride and sulfate interference. However, as Mallinckrodt itself concedes, other commenters discussed the possibility of fluoride/sulfate interference when they com-

mented on the iron and steel data. Mallinckrodt commented on the iron and steel data; it could have raised the issue of fluoride/sulfate interference at that point. We cannot conclude that by its use of the zirconiun-hafnium data EPA deprived Mallinckrodt of meaningful notice and opportunity to comment on the effluent limits for ammonia.

B.

Mallinckrodt challenges the flow allowances for the columbium-tantalum industry, on the grounds that it did not have notice or an opportunity to comment on the normalizing parameter, and that EPA did not use data from one of Mallinckrodt's plants. Neither of Mallinckrodt's contentions with respect to flow allowance merits remanding the regulations. In the proposed rules, EPA had calculated the permissible flows according to the amount of end-product. That is, a plant was entitled to discharge more wastewater if it produced more salts or metal. In the final rules, EPA made flow allowances proportional to the amount of raw material used. Mallinckrodt complains that it was never given an opportunity to comment on EPA's decision to normalize flow on the basis of raw concentrate rather than end-product. Mallinckrodt says that the final rules would permit it to disharge only 218 pounds of ammonia per year, as opposed to the 1,219 pounds per year permitted by the proposed rules.

EPA replies that Mallinckrodt's flow allowance dropped not because of the change in normalizing parameters but because EPA obtained more flow data and realized that the original flow allowance was too high. EPA changed the normalizing parameter in response to other comments. However, Mallinckrodt's flow allowance would have dropped dramatically even if EPA had not changed the normalizing parameter. Therefore, the pertinent question is whether EPA acted arbitrarily in excluding Mallinckrodt's data when it calculated the flow allowance.

To set the flow for concentrate digestion wet air pollution control, EPA obtained data from three plants, numbered 507, 509 (Mallinckrodt's plant) and 519. Plant 519 used the same air pollution control for two separate processes; EPA concluded that it could not base a flow allowance for one process on the data from plant 519. Plant 509 discharged fifteen times more wastewater than plant 507. EPA says that the two plants were similar in many respects and that although Mallinckrodt had many opportunities to do so, it never pointed out any process differences during the rulemaking. EPA decided that plant 509's flow rate was excessive, and based the standard on plant 507.

Here, EPA was setting the standard according to BPT (best practicable technology), rather than BAT. BPT is normally the average of the best performing plants. However, since EPA had data from only three plants, and one set of data was clearly unusable, it was not unreasonable for EPA to set limits according to the better remaining performer. *See National Crushed Stone*, 449 U.S. at 76 n.15.

V

The objections made to the EPA regulations by petitioners have been numerous. We have considered those we believe to be the most substantial, and we find them insufficient to establish a case of arbitrary behavior on the part of the agency. The technical intricacy of the judgments at issue reminds us again of the constraints and limitations of judicial review and of the heavy obligations imposed upon agency specialists to bring to their tasks a sense of fairness as well as a briefcase of expertise.

In this case the Environmental Protection Agency conducted its rulemaking in conformity with the Administrative Procedure Act and the Clean Water Act. To the best of this court's belief, the regulations here were properly promulgated and will assist the protection of human health,

nutriment, and recreation which the Congress envisioned as the legacy of cleaner waterways.

The petitions are accordingly

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288

KENNECOTT,

Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GTE PRODUCTS CORPORATION,

Intervenor/Petitioner.

FILED:

JANUARY 24, 1986

No. 84-1479

AMERICAN MINING CONGRESS, AMAX, INC., and ASARCO INCORPORATED,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1487

ST. JOE MINERALS CORPORATION,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1659

THE SECONDARY LEAD SMELTERS ASSOCIATION,
Petitioner,

versus

WILLIAM RUCKELSHAUS, Administrator
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

GULF COAST LEAD COMPANY,
Intervenor. Petitioner

No. 84-1694

MALLINCKRODT, INC.
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

The petitions of Group I Petitioners: Kennecott, American Mining Congress, AMAX, Inc., ASARCO, Inc. and St. Joe Minerals Corporation; Group III Petitioners: The Secondary Lead Smelters Association, Inc. and Gulf Coast Lead Company, Inc.; and Group IV Petitioner: Mallinckrodt, Inc. for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Phillips and Judge Murnaghan.

For the Court,

/s/JOHN M. GREACEN
John M. Greacen
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288(L)

KENNECOTT,

Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GTE PRODUCTS CORPORATION,

Intervenor for Petitioner.

FILED:

AUGUST 2, 1985

No. 84-1479

AMERICAN MINING CONGRESS, *et al.*,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1487

ST. JOE MINERALS CORPORATION,

Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1629

THE ALUMINUM ASSOCIATION, INC.,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

No. 84-1630

ALUMINUM RECYCLING ASSOCIATION,

Petitioner,

versus

U. S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1659

THE SECONDARY LEAD SMELTERS ASSOCIATION,

Petitioner,

versus

WILLIAM RUCKELSHAUS, etc.,

Respondent.

Gulf Coast Lead Company,

Intervenor for Petitioner

No. 84-1694

MALLINCKRODT, INC.,

Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ORDER

Upon consideration of Group I petitioners' unopposed motion for leave to file a supplemental appendix as an addendum to their reply brief;

IT IS ORDERED that the motion is granted.

FOR THE COURT—BY DIRECTION

/s/JOHN M. GREACEN
John M. Greacen
CLERK

APPENDIX D

[Appendix 4 in Petitioners' Reply Brief]

AFFIDAVIT OF DOUGLAS E. McALLISTER

1. My name is Douglas E. McAllister. I am the Assistant Chief Counsel, American Mining Congress (AMC), 1920 N Street, N.W., Suite 300, Washington, D.C.

Since 1979, I have had primary AMC staff responsibility relating to the Environmental Protection Agency's (EPA) Nonferrous Metals Manufacturing Effluent Limitations Guidelines (Phase I). In this capacity I served as the primary coordinator between the AMC member companies and EPA representatives. I assisted the AMC working group that developed comments on EPA's proposed Phase I regulations and submitted the comprehensive AMC data base from seven primary nonferrous metals facilities owned by AMC member companies.

2. On December 16, 1983, a representative of St. Joe Minerals Company and I telephoned the EPA Project Officer and inquired about the status of EPA's analysis of the AMC data base. (*See* R. 44622; JA 1854). He said EPA was contemplating the possibility of adding sulfide precipitation to the "best available technology" (BAT) designation in the final regulations. He did not indicate in this conversation that EPA would adopt sulfide precipitation without first allowing AMC to examine and comment on any supporting data. This was the first time EPA notified AMC of any possibility that sulfide precipitation technology would be added to the regulations. At that time we requested from the Project Officer any and all available information on sulfide precipitation; no information was supplied prior to adoption of the final regulations.

3. On January 5, 1985, I, along with members of the AMC working group, had a conference telephone call with the EPA Effluent Guidelines Branch Chief and Project

Officer. We inquired about the results of EPA's analysis of the AMC data base. During this conference call, we were told that EPA had decided to add sulfide precipitation to lime, settle and filtration as the designated BAT in the final regulations.

We inquired about the basis for the Agency's reliance on sulfide precipitation and were told that a "couple of facilities in the nonferrous metals industry" use sulfide precipitation technology. The Agency representatives also referred to the inorganic chemicals development document, the metals finishing development document, the nonferrous metals development document and data EPA obtained from the Boliden smelter in Sweden.

We were told that EPA was conducting bench-scale tests using sulfide precipitation on wastewater samples taken from the Kennecott smelter and the data from this test might be used to support EPA's designation of sulfide precipitation as BAT. We requested and were promised a copy of the report of this testing.

We were also told, for the first time, that EPA intended to adopt sulfide precipitation without providing any opportunity for comment. EPA failed to include a record of this conference call in the Administrative Record. My contemporaneous notes of this conversation are incorporated herein as Attachment A.

4. AMC did not receive a copy of the Kennecott report until May 16, 1984, over 2 months after the final regulations were issued. *See* Attachment B. To the best of my knowledge, no AMC member company received a copy of the Kennecott report prior to that time. Kennecott itself did not receive the report until after it filed a Freedom of Information Act request. *See* Attachments C and D.

/s/DOUGLAS E. MCALLISTER
Douglas E. McAllister

Subscribed and sworn to before
me this 12th day of July, 1985

/s/BECKY RAE BAGGERUD
Notary Public

My commission expires:

My commission expires August 14, 1989

Attachment A

[Handwritten Notes of Mr. McAllister]

Q: Using battery long term data for pb?

Attachment A

Basis of sulfide precip.? data? transferability?
Costing info on sul. precip.?

Kenn sampling -

CF CALL W/ Berlow & Hall
1/5/84

Robbins
Crosser
Janeck
Berlow
Hall
McAllister

1- Promul Jan' 31 - will do it.

2- Bottom line: of 7 plants
3 pass tech. screen based on design
(Sauget, Boss, Monaca)
Thrown out Port Nickel - all rainfall
ASARCO Corpus: stormwater
Herculaneum: underdesigned clarifiers
no equalization

3- For 3 plants: LS, LSF cannot meet #'s
Primary zn: Sauget can't meet b/c influent conc.
high. preleach contributes
Monaca - ammonia complexation
Boss - high influent - something else going on.

3 facilities doing a *lot worse than norm* - (CMDB)
Boss - " " - #s in other category
(from a concentration standpoint) " " - other categories in Ernie division. (incld. those not using CMDB).

: need add'l technology: sulfide precipitation.
gen'lly-[produces hazardous sludge, removal not significant, expensive
Here- thinks it will have sig. removal

L & S, sulfide & settle filter
1 2 3

To handle selection problem.
- Ft. Madison
- tungsten (EPA has some data)

Couple of facilities in NF industry - Copper refining
Does not know re
Port Nickel
DEM get *copy* - Inorganic chemicals Dev. Doc. CD, zn
Phase I
- Metal Finishing - address sulfide (Dev. Doc)
- addressed in NF Doc in terms of relative removal.
- Sweden - Bleden - Batelle

pb - #'s modified as result of F.R. notice, battery 2⁰ pb
Costing done on sulfide tech.
disposal of haz. waste sludge
precip & sed. step. (Doubled L&S greenfield #'s)
capital costs
will refine #'s later this mo.
sodium sulfide used by EPA

optimum sul. precip occurs at 7 or higher pH.
sludge disposal - cost figured generally across the board

Kennecott - arsenic problem. EPA looking to get AS down.
Bench scale tests. Done in time for promulgation.
Either-or, if then,

Data may be used gen'lly to support sul. precip. #'s.
Ravan- end of week of 1/16.

Each plant analyzed individually
Long term mean, 10 day, 30 day.
Then reacted to range.

Changes in proposal requiring reproposal.
EPA attys think these changes do not require reproposal
#'s are same as proposed.
These plants have difficulty : add'l technology.

No closures. No line closures.
No serious economic consequences.
Cost effectiveness #'s aren't finished yet.

Non-building block flows -
Not likely that language will end up in regulation itself but will be in preamble.

Aluminum Forming is happy with way its handled there.
F.R. printing policy & guidelines.

Not anywhere near 100,000,000

Attachment B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 16 1984

Mr. Douglas McAllister
American Mining Congress
1200 18th Street, N.W.
Washington, D.C. 20036

Dear Mr. McAllister:

Please find attached the results of the Kennecott treatability study that you have requested. If you have any technical questions regarding this study, please feel free to contact me.

Sincerely,
/s/JAMES R. BERLOW
James R. Berlow, P.E.
Project Officer
Metals & Machinery Branch (WH-552)

Enclosures

Attachment C

PRATHER SEEGER DOOLITTLE & FARMER
1101 Sixteenth Street, N.W.
Washington, D.C. 20036

March 19, 1984

BY HAND DELIVERY

Mrs. Jeralene Green
Freedom of Information Officer (A-101)
Room 227D - West Tower
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Freedom of Information Act Request

Dear Mrs. Green:

On behalf of Kennecott, I request, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and Environmental Protection Agency regulations, Part 2 - Public Information, Subpart A - Requests for Information, 40 C.F.R. § 2.100, *et. seq.*, that the following materials be made available for inspection and copying:

Any and all information, records, raw data, test results, analysis and evaluation concerning Radian Corporation's sampling and bench scale testing of sulfide precipitation on wastewater samples collected at Kennecott's Utah Copper Division in December, 1982.

Please contact me by telephone (296-0500) as soon the Initial Determination, required by April 2, 1984, has been made.

Thank you for your help.

Yours very truly,
/s/RICHARD T. WITT
Richard T. Witt

Attorney for Kennecott

RTW:jsw

Attachment D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APRIL 17, 1984

Richard T. Witt, Esq.
Prather, Seeger, Doolittle, & Farmer
1101 Sixteenth Street, N.W.
Washington, D.C. 20036

RE: Freedom of Information Act Request of Kennecott Copper Co. RIN-840-84

Dear Mr. Witt:

This letter responds to your request of March 19, 1984, on behalf of Kennecott Copper Co., for "(a)ny and all information, records, raw data, test results, analysis and evaluation concerning Radian Corporation's sampling and bench scale testing of sulfide precipitation on wastewater samples collected at Kennecott's Utah Copper Division in December, 1983."

Although this information is not in the Agency's possession, and so at this time is not an "Agency record" for purposes of the Freedom of Information Act, the Agency has decided to grant your request. This information is part of the administrative record to the nonferrous metals phase I rules. We are now in the process of compiling, collecting, indexing and printing the record. The particular information you request is being collated as part of that process.

This process will not be completed by April 16. The Agency, in fact, is not required to file the administrative record until May 14. The certified index to the record also need not be filed until sometime in May. We are trying to collate the bench-scale data on sulfide precipitation more rapidly so you can receive it before we file the entire

record or the certified index. However, the personnel involved in preparing the record are all also involved in developing other regulations that are subject to court-mandated deadlines. Accordingly, we cannot promise precisely when we will be able to supply this information to you, beyond stating that we will try and furnish it before the record is filed.

You may appeal this initial determination by sending a written appeal to the EPA Freedom of Information Officer, A-101, 401 M Street, S.W., Washington, D.C 20460. Any appeal must be filed within 30 days of receipt of this letter.

Sincerely yours,

/s/STEVEN SCHATZOW

Steven Schatzow, Director

Office of Water Regulations &

Standards (WH-551)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288(L)

KENNECOTT,

Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GTE PRODUCTS CORPORATION

Intervenor/P.

FILED:

APRIL 16 1985

No. 84-1479

AMERICAN MINING CONGRESS, *et al.*,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1487

ST. JOE MINERALS CORPORATION,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1629

THE ALUMINUM ASSOCIATION, INC.,
Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

No. 84-1630

ALUMINUM RECYCLING ASSOCIATION,
Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1659

THE SECONDARY LEAD SMELTERS ASSOCIATION,
Petitioner,

versus

WILLIAM RUCKELSHAUS, etc.,
Respondent.

GULF COAST LEAD COMPANY,
Intervenor/P.

No. 84-1694

MALLINCKRODT, INC.,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

Upon consideration of Group I petitioners' motion for reconsideration of the court order entered March 1, 1985, which struck portions of petitioners' briefs and denied petitioners' motions to supplement the record;

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Hall and Judge Murnaghan.

FOR THE COURT,

/s/JOHN M. GREACEN
John M. Greacen
CLERK

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288(L)

KENNECOTT,

Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GTE PRODUCTS CORPORATION,

Intervenor/P.

FILED:

MARCH 1, 1985

No. 84-1479

AMERICAN MINING CONGRESS, *et al.*,

Petitioners,

vversus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1487

ST. JOE MINERALS CORPORATION,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1629

THE ALUMINUM ASSOCIATION, INC.,
Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

No. 84-1630

ALUMINUM RECYCLING ASSOCIATION,
Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1659

THE SECONDARY LEAD SMELTERS ASSOCIATION,
Petitioner,

versus

WILLIAM RUCKELSHAUS,etc.,
Respondent.

GULF COAST LEAD COMPANY,
Intervenor/P.

No. 84-1694

MALLINCKRODT, INC.,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1782

NRC, INC.,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

Upon consideration of the motions of the Group I and the Group III petitioners to supplement the record and their motions for extension of time to reply to respondent's motion in opposition to the motions to supplement and its motion to strike;

IT IS ORDERED that the motions are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Hall and Judge Murnaghan.

FOR THE COURT,

/s/JOHN M. GREACEN
John M. Greacen
CLERK

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1288(L)

KENNECOTT,

Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GTE PRODUCTS CORPORATION,

Intervenor/Petitioner

FILED:

AUGUST 23, 1984

No. 84-1479

AMERICAN MINING CONGRESS, AMAX, INC., and ASARCO INCORPORATED,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 84-1487

ST. JOE MINERALS CORPORATION,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent.

No. 84-1629

THE ALUMINUM ASSOCIATION, INC., KAISER ALUMINUM & CHEMICAL CORPORATION, and REYNOLDS METALS COMPANY,
Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and WILLIAM D. RUCKELSHAUS, Administrator,
Respondents.

No. 84-1630

ALUMINUM RECYCLING ASSOCIATION,
Petitioner,

versus

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 84-1659

THE SECONDARY LEAD SMELTERS ASSOCIATION,
Petitioner,

versus

WILLIAM RUCKELSHAUS, Administrator
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

No. 84-1694

MALLINCKRODT, INC.,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

No. 84-1782

NRC, INC.,
Petitioner,

versus

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

ORDER

Pursuant to Local Rule 28,

IT IS ORDERED that the above-styled cases are consolidated for briefing and oral argument. A briefing schedule will be established upon receipt of the certified list. The petitioners will be grouped into four interest groups at the time the briefing schedule is established and each interest group will be allowed to file a separate brief and reply brief. All parties will coordinate in the filing of a single joint appendix and all parties to a side shall share the time allowed for oral argument provided by the Federal Rules of Appellate Procedure. All future materials filed in these consolidated cases shall be marked with the lead docket number—No. 84-1288(L).

For the Court—By Direction.

/s/JOHN M. GREACEN
John M. Greacen
CLERK

APPENDIX H

UNITED STATES CODE
CHAPTER 5—ADMINISTRATIVE PROCEDURE

* * * * *

§ 553 Rulemaking

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * * * *

APPENDIX I

FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED BY THE CLEAN WATER ACT OF 1977
(Commonly Referred to as Clean Water Act)

* * * * *

Sec. 304 INFORMATION AND GUIDELINES

* * * * *

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall

* * * * *

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works: and

* * * * *

APPENDIX J

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 421

[OW-FRL-2289-1]

Nonferrous Metals Manufacturing Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency [EPA]

ACTION: Proposed regulation.

* * * * *

VII. Available Wastewater Control and Treatment Technology

A. Control Technologies Considered

The control and treatment technologies available for this category include both in-process and end-of-pipe treatments. These technologies were considered appropriate for the treatment of nonferrous metals manufacturing wastewater and formed the basis of the regulatory options. These control and treatment technologies are discussed in greater detail in Section VII of the General Development Document. The applicability of each of the technologies to specific sources of wastewater is discussed in the subcategory supplements.

In-process treatment includes a variety of water flow reduction steps and major process changes. The following in-process treatments are considered for this proposal:

Recycle. Recycling of processing water is the practice of treating and returning water to be used again for the same purpose. Total recycle can be achieved (in theory) through the use of reverse osmosis. In establishing PSES for secondary copper, EPA considered complete recycle and reuse of process wastewater after treatment with lime precipitation, and sedimentation to remove suspended solids and metals. EPA also considered partial recycle of process water by using cooling towers and holding tanks. In doing so, we considered that it may be necessary to discharge a bleed stream to purge dissolved and suspended solids that tend to accumulate in the system.

End-of-pipe treatment includes modules used to reduce pollutant concentrations prior to discharge. The following end-of-pipe treatments are considered for this proposal:

Chemical Precipitation. Chemical precipitation generally involves adjusting the pH and adding a flocculationg agent to precipitate out of solution metal ions (e.g., copper) and certain anions (e.g., fluoride). The chemical commonly associated with this treatment is lime.

Sedimentation. Sedimentation is a process which removes solid particles from a liquid matrix by gravitational force. This is done by reducing the velocity of the feed stream in a large volume tank or lagoon so that gravitational settling can occur. This treatment when combined with chemical precipitation is frequently referred to as lime and settle treatment.

Ammonia Steam Stripping. Steam may be used to remove ammonia from process wastewater. Generally, the steam is introduced into a separation column countercurrent to the process wastewater. The ammonia is absorbed into the steam. In some instances it may be necessary to

add an additional stripping stage in which the pH of the wastewater is elevated in order to remove certain types of ammonia compounds.

Cyanide Oxidation or Precipitation. With the addition of oxidizing agents or complexing agents cyanide can either be oxidized or complexed. Cyanide can also be precipitated out of solution using ferrous or zinc sulfate. Cyanide precipitation is the more effective technology for removal of cyanide complexed with metals such as iron.

Oil Skimming. Oil and other materials with a specific gravity less than water often float unassisted to the surface of the wastewater. Skimming removes these floating wastes usually in a tank designed to allow floating debris to rise while the water flows to an outlet located below the floating layer. A variety of devices are used to remove the floating layer from the surface.

Carbon Adsorption. The use of activated carbon to remove dissolved organics is one of the most efficient organic removal processes available. The carbon removes contaminants from water by the process of adsorption or the attraction and accumulation of one substance on the surface of another. Activated carbon preferentially adsorbs organic compounds and because of this selectivity is particularly effective in removing organic compounds from aqueous solution.

Activated Alumina. Activated alumina may be used as an end-of-pipe treatment process to further reduce concentrations of arsenic and fluoride below those in the effluent from a chemical precipitation and sedimentation system.

Multimedia Filtration. Gravity mixed-media filtration may be used as an end-of-pipe polishing step to reduce concentrations of toxic metals. Rapid sand or pressure filters perform as well and may be used interchangably with gravity mixed media filters.

Reverse osmosis was considered for the purpose of achieving zero discharge of process wastewater; however, the Agency ultimately rejected this technology because it was determined that its performance for this specific purpose was not adequately demonstrated in this category nor was it clearly transferable from another category. Activated alumina was also considered; however, this technology was rejected because it too was not demonstrated in this category nor was it clearly transferable to nonferrous wastewater.

B. Status of In-Place Technology

Current wastewater treatment practices in the nonferrous metals manufacturing category range from no treatment to treatment with chemical precipitation, sedimentation and filtration. Of the 134 discharging plants, 61 plants have treatment to remove metals and suspended solids, four have technologies for oil removal, six practice ammonia stripping and 22 practice end-of-pipe filtration. The remainder of the dischargers did not report any treatment for their nonferrous metals manufacturing wastewaters.

Recycle using treatment of lime precipitation and sedimentation is practiced at 20 plants. Three plants use filtration while two other plants use ammonia stripping prior to recycling process water.

C. Control and Treatment Options

EPA considered the following treatment and control options as the basis for BPT, BAT, BCT, NSPS, PSES, and PSNS for facilities within the nonferrous metals manufacturing category:

Option A—End-of-pipe treatment consisting of lime precipitation and sedimentation, and preliminary treatment, where necessary, consisting of oil skimming, cyanide precipitation, and ammonia steam stripping. This combination

of technology reduces toxic metals and conventional and nonconventional pollutant.

Option B—Option B uses the same end-of-pipe treatment as Option A (lime precipitation and sedimentation) preceded by flow reduction of process wastewater through the use of cooling towers for contact cooling water and holding tanks for all other process wastewater subject to recycle.

Option C—Option C uses the same in-process flow reduction as Option B and adds polishing filtration to the end-of-pipe treatment included in Options A and B (preliminary treatment, lime precipitation, sedimentation and filtration). This result in a further reduction of toxic metals and TSS.

Option D—Option D uses the in-plant flow reductions and end-of-pipe treatment in Option C and adds treatment of isolated waste streams with activated carbon adsorption for removal of toxic organics and activated alumina for reduction of fluorides and arsenic concentrations.

Option E—Option E consists of Option C flow reduction and end-of-pipe technology plus activated carbon adsorption applied to the total plant discharge as a polishing step to reduce toxic organic concentrations.

Option F—Option F consists of Option C flow reduction and end-of-pipe technology plus reverse osmosis treatment to attain complete recycle of all process wastewater.

* * * * *

XXIV. Solicitation of Comments

EPA invites public participation in this rulemaking. We ask that any perceived deficiencies in the record be addressed specifically. We also ask that any suggested revisions or corrections be supported by data.

In addition to issues already addressed in the preamble, EPA is particularly interested in receiving additional comments and information on the following issues:

* * * * *

2. The Agency is continuing to seek additional data to support these proposed limitations. The treatment effectiveness data for lime precipitation and sedimentation and lime precipitation, sedimentation and filtration technology. This regulation are based on the results of Agency sampling of the raw wastewaters and treated effluents from a broad range of plants generating similar wastewaters and (for filtration) on long-term self-monitoring. The Agency invites comments on the treatment effectiveness results, and the statistical analysis and underlying assumptions discussed in Section VII of the Development Document as they pertain to the nonferrous metals manufacturing plants. The Agency specifically requests long-term sampling data (especially paired raw wastewater-treated effluent data) from nonferrous metals manufacturing plants having well-operated treatment systems using the treatment technologies relied upon for this regulation, and also other equally effective treatment technologies.

* * * * *

APPENDIX K

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 421

[OW-FRL 2289-1]

Nonferrous Metals Manufacturing Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency [EPA]
ACTION: Final rule.

* * * * *

C. Technology Basis for Final Regulations

* * * * *

Primary Copper Electrolytic Refining

* * * * *

Extensive effluent data submitted to the Agency by an integrated copper refiner and smelter have indicated that the proposed arsenic mass limitations based on lime and settle treatment may not be achievable for this plant. The Agency believes that the larger arsenic values in the plant's ore contribute significant quantities of arsenic to the treatment system. Arsenic concentrations in excess of 100 mg/l are common at this plant, making the combined metals data base inappropriate. The Agency believes that the mass limitations as proposed for the primary electrolytic copper

limitations as proposed for the primary electrolytic copper refining subcategory and metallurgical acid plant subcategory are achievable for this plant by adding sulfide precipitation to the model treatment technology. The Agency thus has determined that the combination of sulfide precipitation, lime and settle, and multimedia filtration will achieve the mass limitations promulgated and has included this technology in its compliance cost estimates for this one plant.

* * * * *

Primary Lead

The Agency has amended the proposed BAT technology basis for primary lead plants operating acid plants to include sulfide precipitation. The technology basis thus consists of in-process flow reduction through recycle and end-of-pipe lime and settle, sulfide precipitation (followed by sedimentation), and multimedia filtration technology. Extensive treatment performance data submitted to the Agency from a plant in this subcategory suggest that the proposed BAT mass limitations may not be achievable. The principal reason for not being able to attain the filtration performance data is the inability to achieve the combined metals data lime and settle values. However, the Agency believes the addition of sulfide precipitation, in conjunction with multimedia filtration, will achieve the treatment performance values as proposed wastewaters. (Sulfide precipitation technology is discussed fully in Section VII of the General Development Document.) Sulfide precipitation is currently demonstrated at a primary molybdenum plant with a metallurgical acid plant, and at a cadmium plant in the primary zinc subcategory. For those plants only generating wastewater to meet industrial hygiene requirements, the technology basis does not include sulfide precipitation since these waste streams are not so contaminated as to require the additional treatment.

* * * * *

Primary Zinc

The Agency has amended the proposed BAT technology basis for the primary zinc subcategory to include sulfide precipitation. The complete technology basis thus consists of in-process flow reduction through recycle and end-of-pipe lime and settle, sulfide precipitation (followed by sedimentation), and multimedia filtration technology. Extensive treatment performance data submitted to the Agency by a plant in the subcategory demonstrate that the proposed BAT mass limitations may not be achievable. The principal reason for not being able to attain the filtration performance data is the inability to achieve the combined metals data lime and settle values. However, the Agency believes for the reasons given in Section V.B above that the addition of sulfide precipitation in conjunction with multimedia filtration, will achieve the treatment performance values as proposed. Sulfide precipitation is currently demonstrated at a primary molybdenum plant with a metallurgical acid plant and at a cadmium plant in the primary zinc subcategory.

* * * * *

Metallurgical Acid Plants

The Agency has amended the proposed technology basis for one copper acid plant and for all acid plants associated with zinc and lead smelting to include sulfide precipitation. The complete technology basis for this subcategory thus consists of in-process flow reduction through recycle and end-of-pipe lime and settle, sulfide precipitation (followed by sedimentation), and multimedia filtration technology. Extensive treatment performance data submitted to the Agency by copper, lead, and zinc acid plants demonstrate that the proposed BAT mass limitations are not achievable largely due to inability to achieve the combined metals data lime and settle values. However, for the reasons al-

ready explained, the Agency believes that addition of sulfide precipitation, in conjunction with multimedia filtration, will achieve the treatment performance values as proposed. Sulfide precipitation is currently demonstrated at a primary molybdenum plant with a metallurgical acid plant, and at a cadmium plant in the primary zinc subcategory.

Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1741 and 85-1748

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

SECONDARY LEAD SMELTERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20460

21pp

QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA) complied with public notice and comment requirements of the Administrative Procedure Act when it promulgated effluent limitations guidelines and standards for the primary lead, zinc, copper, and metallurgical acid plant subcategories of the nonferrous metals industry under the Clean Water Act.

2. Whether the court of appeals applied the proper standard under the Administrative Procedure Act in reviewing EPA's promulgation of effluent limitations guidelines and standards for the secondary lead subcategory of the non-ferrous metals industry.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1741

AMERICAN MINING CONGRESS, ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

No. 85-1748

SECONDARY LEAD SMELTERS ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL
PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a)[1] is reported at 780 F.2d 445.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. Petitions for rehearing and rehearing en banc were denied on January 24, 1986. The petitions for a writ of certiorari were filed on April 24, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the separately bound appendix in No. 85-1741.

STATEMENT

These two cases concern the validity of effluent limitations guidelines and standards for the non-ferrous metals industry promulgated by United States Environmental Protection Agency (EPA) pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.* On petitions for review, the court of appeals upheld the guidelines and standards (Pet. App. 1a-33a).

1. In the Clean Water Act, Congress authorized EPA to establish technology-based effluent limitations guidelines and standards for categories of industrial dischargers. See 33 U.S.C. 1311(b), 1314(b), 1316, 1317(a).[2] On February 17, 1983, EPA published proposed guidelines and standards for the nonferrous metals industry. 48 Fed. Reg. 7032-7126.[3] The guidelines and standards were based on data obtained by EPA from responses to questionnaires sent to 319 firms, consulting reports, and scientific literature. Pet. App. 7a-8a; 48 Fed. Reg. 7044-7045 (1983). In the Federal Register publication, EPA announced that the proposed regulations were supported by three major documents, including a "Development Document" which explained the bases of EPA's technical conclusions. 48 Fed. Reg. 7032 (1983).

---

[2] "Effluent limitations guidelines" concern existing industrial dischargers (33 U.S.C. 1314(b)), with the exception of those sources which discharge into publicly owned treatment works, which are governed by "pretreatment standards" (33 U.S.C. 1317(b) and (c)). New source performance standards concern new industrial dischargers (33 U.S.C. 1316). See generally *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 1-8; *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977); *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200, 203-209 (1976).

[3] EPA had previously promulgated effluent limitations guidelines and standards and pretreatment standards for certain nonferrous metals manufacturing subcategories. See 48 Fed. Reg. 7033-7034 (1983).

EPA made publicly available all three documents, including the Development Document, for inspection and copying (*ibid.*).

The initial comment period, which continued for 11 weeks, was reopened on two occasions. See 48 Fed. Reg. 50906 (1983); 48 Fed. Reg. 52604 (1983). EPA considered the comments and, at least with respect to each petitioner in these two cases, contacted the commenting party to make further inquiry (Pet. App. 7a-8a). In light of these comments, EPA revised several proposals and sought additional data concerning others (*id.* at 8a). On March 8, 1984, EPA published final effluent limitations guidelines and standards. 49 Fed. Reg. 8742-8831. The final administrative record for the rulemaking was approximately 55,000 pages in length (85-1741 Pet. 5). The final rules, like the proposed rules, provided guidelines and standards for twelve subcategories within the general category of nonferrous metals manufacturing. 49 Fed. Reg. 8743 (1984).

2. Petitioners, among others, challenged the validity of the final effluent limitations guidelines for the nonferrous metals industry in a consolidated action in the United States Court of Appeals for the Fourth Circuit. Petitioners in No. 85-1741 argued, inter alia, that certain final effluent limitations guidelines for subcategories of the primary metals industry were invalid because they departed so substantially from the proposed rules that petitioners were deprived of adequate notice of, and a meaningful opportunity to comment on, the final rules (Pet. App. 9a, 13a-14a).[4] EPA's final rules, while basically adhering to the effluent limitations guidelines and standards proposed,[5] added that any plant unable to meet the

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[4] Because petitioners do not renew their other challenges to EPA's final rules, we do not address those contentions.

[5] The final effluent limitations guidelines and standards were either unchanged or less restrictive than those proposed.

effluent limitations by using the technology described in the proposed rule (lime precipitation, settle, and filter treatment technology (LS&F)) should also use "sulfide precipitation" to achieve the further effluent reduction required (*id.* at 13a).[6] Petitioners complained below that EPA failed to notify them that the agency might rely on that additional method of waste treatment (*id.* at 13a-14a). The court of appeals rejected petitioners' claim on the ground that there was "ample indication [in the record to the proposed rule] that [petitioners] should reasonably have known that EPA was considering sulfide precipitation" (*id.* at 14a-15a). The court noted that the preamble to the proposed rule solicited comments on alternative treatment technologies and that the proposed Development Document discussed in detail the advantages and disadvantages of sulfide precipitation (*id.* at 15a).

Petitioners in No. 85-1748 argued, inter alia, that portions of the final effluent limitations guidelines and standards for the secondary lead industry were invalid because EPA had failed adequately to consider compliance costs, used erroneous data, improperly rejected industry data, and, as a result, imposed unachievable effluent limitations guidelines and standards that lacked record support. Pet. App. 21a-27a. The court of appeals rejected all of these contentions and upheld EPA's rulemaking (*ibid.*). The court ruled that EPA had made a "careful analysis of compliance costs and their economic impact" (*id.* at 23a), did not act arbitrarily in selecting data, particularly in rejecting some of the data supplied by the industry (*id.* at 23a-24a), and otherwise had a reasonable basis in the ad-

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[6] As explained by the court of appeals (Pet. App. 13a), sulfide precipitation is based on the principle that the addition of sulfide to wastewater will cause certain pollutants to precipitate out and in turn to settle to the bottom of the solution where the solid product may easily be removed. Lime precipitation operates in a similar fashion except that lime is used as the precipitating agent instead of sulfide.

ministrative record for the effluent limitations guidelines and standards finally promulgated (*id.* at 21a-24a, 25a-27a). The court also held that petitioners' challenge to effluent limitations guidelines and standards for the pollutant cadmium was not ripe (*id.* at 25a-26a).

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of any other court of appeals or of this Court, and presents no issue warranting this Court's review.

1. a. Petitioners in No. 85-1741 contend that EPA violated the Administrative Procedure Act (APA) public notice and comment requirements because the final rules relied upon a technology—sulfide precipitation—not relied upon in the proposed rule. Petitioners, however, mischaracterize the notice provided by EPA and misapprehend the APA's procedural mandate, which has been amply satisfied in this case. The APA requires only that an agency make public "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). When promulgating rules under the Administrative Procedure Act, an administrative agency typically will revise proposed rules in response to comments the agency receives—indeed, the agency might well be faulted for not adequately considering the comments if it did not. The agency is not, however, bound to repropose every rule that it chooses to revise. A contrary rule could lead to endless proposed rulemakings and thus to prolonged frustration of important statutory purposes. Instead, an agency is normally obliged to publish a new proposed rule, rather than a revised final rule, only when two circumstances are present: (1) the revision is substantial; and (2) absence of notice would deprive the public of a meaningful opportunity to comment on the revision. Neither circumstance is present in this case.

Petitioners' complaint is not directed to any change in the effluent limitations guidelines or standards between the proposed and final rules, but rather merely to the agency's announcement in the final rules that a supplemental control technology might be used to achieve the level of effluent reduction required. The Clean Water Act requires only that an industrial discharger meet applicable effluent limitations and standards and does not direct the discharger to adopt a particular control technology. See 33 U.S.C. 1311(b), 1314(b). Consequently, EPA's addition of a supplemental control technology was not, without more, a substantial revision of EPA's proposed rule.

In any event, even if the reference in the final rules to the availability of a supplemental control technology could properly be considered a substantial revision, petitioners had adequate notice of that control technology at the proposal stage. As the court of appeals found (Pet. App. 14a-15a), there was "ample indication [in the record] that [petitioners] should reasonably have known that EPA was considering sulfide precipitation." The Federal Register notice of the proposed rules explained that chemical precipitation (which includes sulfide precipitation) was one of the treatment technologies under consideration by EPA and EPA specifically requested comments on "the treatment technologies relied upon for this regulation, and also *other equally effective treatment technologies.*" 48 Fed. Reg. 7046, 7073 (1983) (emphasis added). Even more fundamentally, the Development Document, the importance of which EPA stressed in the Federal Register notice and which EPA made publicly available (48 Fed. Reg. 7032 (1983)), contained an extensive discussion of sulfide precipitation. The Development Document noted that sulfide precipitation is "highly reliable," and is effective in achieving incremental reduction of specific metals that are not fully removed by LS&F technology under the circumstances petitioners main-

tained were present at their plants (A.R. 21718, 21727, 21729, 21730).[7] And, as the court of appeals stressed (Pet. App. 15a), "the Development Document contained several charts on sulfide precipitation, including data on the performance of sulfide-precipitation-sedimentation systems and a comparison of the solubilities of hydroxides and sulfides of selected metals."

Petitioners nonetheless contend (85-1741 Pet. 5, 10-13) that notice was inadequate because the Development Document was not published in the Federal Register and sulfide precipitation was just one of many control technologies discussed in the Document. Concomitantly, petitioners claim (*id.* at 13) that the court of appeals misunderstood the nature of the Document, believing it to be formally part of the proposal (*ibid.*). Both contentions are unpersuasive. The central role of the Development Document is not only well settled in administrative rulemaking under the Clean Water Act (see *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. at 132 n.23) but, as noted above, was highlighted by EPA in its Federal Register notice. A fundamental purpose of the Development Document is to afford "a greater opportunity for public input into the final [effluent limitation] regulations, by giving notice of the general outlines of those regulations" (*ibid.*). The Document need be neither formally published in the Federal Register nor formally part of the proposed regulation to serve this important function. Petitioners, moreover, are particularly hard-pressed to suggest (85-1471 Pet. 12-13) that they were unaware of the importance of the Document and its contents given that they requested, received, and submitted comments on a draft of the Document prior to publication of the proposed rules (A.R. 18496-18506). As the court of appeals properly

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[7] Citations to the Administrative Record (A.R.) are taken from the brief filed by the government in the court of appeals.

noted (Pet. App. 15a), "industry may not remain silent during th[e] [comment] period only to complain upon appeal that it was deprived of an opportunity to comment on what it might reasonably have been apprised."

Moreover, petitioners were not denied an opportunity to challenge EPA's adoption of sulfide precipitation as a supplemental technology. The court of appeals carefully considered petitioners' objections to sulfide precipitation, particularly their claim that the technology would not reduce effluent concentrations to the required level (Pet. App. 15a-18a). The court concluded that EPA had a reasonable basis for including sulfide precipitation in the final rules and therefore had not acted arbitrarily or capriciously (*id.* at 17a-18a).

b. Petitioners incorrectly assert (85-1741 Pet. 16-18) that the decision of the court of appeals conflicts with the decision of the District of Columbia Circuit in *American Federation of Labor and Congress of Industrial Organizations* v. *Donovan,* 757 F.2d 330 (1985), and with the Fourth Circuit's own prior decision in *Chocolate Manufacturers Ass'n* v. *Block,* 755 F.2d 1098 (1985). In both *Donovan* and *Chocolate Manufacturers Ass'n,* however, the agency had adopted a revised rule the substance of which had not been placed in issue in the initial Federal Register publication and defended its action on the ground that comments from persons other than those asserting inadequate notice had placed the revision in question and thereby provided the necessary notice. See *Donovan,* 757 F.2d at 338-339; *Chocolate Manufacturers Ass'n,* 755 F.2d at 1103. Here, by contrast, EPA revised, but did not fundamentally alter, the very rule that was the focus of the proposal and about which the agency had invited public comment. Moreover, EPA does not claim that notice of the possible relevance of sulfide precipitation technology was supplied by a comment. Instead, EPA submits, and the court of appeals found, that notice was

provided by the initial Federal Register publication and the contents of the Development Document. Petitioners, therefore, can hardly rely on either case to claim unfair surprise, particularly where, as here, the revision was partly triggered by their comments that LS&F technology would be insufficient and that additional treatment technologies would be needed (see Pet. App. 13a; A.R. 26392, 26395, 26456, 26476-26477). See *Donovan,* 757 F.2d at 339-340 ("It would be passing strange for a party which had recommended in its comment that certain changes be made to a regulation later to complain that it had inadequate notice of the possiblity that the regulation might indeed by changed."). Indeed, the decision below merely exemplifies the commonsense notion, repeatedly applied by the courts, that an agency "may make 'substantial changes' in its original proposed rule if the changes are a 'logical outgrowth' of the original proposal and the notice and comments upon it." Pet. App. 15a, quoting *American Paper Inst.* v. *EPA,* 660 F.2d 954, 959 n.13 (4th Cir. 1981); accord *Sierra Club* v. *Costle,* 657 F.2d 298, 352-353 (D.C. Cir. 1981); *Taylor Diving & Salvage Co.* v. *Department of Labor,* 599 F.2d 622, 626 (5th Cir. 1979); *South Terminal Corp.* v. *EPA,* 504 F.2d 646, 659 (1st Cir. 1974).

c. Ultimately, therefore, the petition raises no significant legal issue, but presents only a fact-bound dispute with the court of appeals concerning the adequacy of the notice petitioners received in the particular rulemaking at issue. Petitioners' claim was fully addressed by the court below and further review is not warranted.

2. Petitioners in No. 85-1748 seek review on the ground that the court of appeals did not apply the correct standard of judicial review in considering their challenges to EPA's rulemaking. Specifically, petitioners contend that the court deferred excessively to EPA's expertise by resolving conflicts in the evidence in the agency's favor and

should instead have "scrutinize[d]" the agency decision in "painstaking detail" as required by the Administrative Procedure Act, which petitioners describe as "the only defense private industry has against the carelessness and caprice of the EPA." 85-1748 Pet. 2-5, 14-19. According to petitioners, agency regulations must be "carefully tailored to promote a specific Congressional directive" and "grounded upon a secure foundation in fact" (*id.* at 17). Petitioners, however, misapprehend the role of judicial review under the Administrative Procedure Act of agency rule-making, particularly in cases, such as this one, involving highly technical issues within the expertise of the federal agency. Petitioners also mischaracterize the actions of both the court of appeals and EPA.

a. The APA provides that a court may overturn informal agency rulemaking only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under this standard, the reviewing court's role is confined to determining whether the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). When, moreover, as in this case, the court is not reviewing simple findings of fact, but is instead reviewing agency determinations that, pursuant to the technology-forcing mandate of the Clean Water Act, are necessarily based on predictive judgments within EPA's expertise (*i.e.*, the degree of effluent reduction achievable by new and existing dischargers), "a reviewing court must generally be at its most deferential" (*id.* at 103). See also *Bowen* v. *American Hospital Ass'n*, No. 84-1529 (June 9, 1986), slip op. 31 n.30 (plurality opinion) (commenting on recognized expertise of EPA in environmental area).

The court of appeals' review of EPA's rulemaking fully comported with the applicable standard of judicial review. The court "determin[ed] whether [EPA's] 'decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment.' " Pet. App. 7a, quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). The court examined "whether EPA's technical judgments found support in the record and whether they reflect the rule of reason" and whether EPA had "fairly considered all significant data and comments" (Pet. App. 7a). And the court deferred to the expertise of EPA in disputes between the parties over the weight to be given conflicting data in the administrative record (*id.* at 5a).

At bottom, therefore, petitioners' claim that their petition presents an important question of administrative law regarding the proper scope of judicial review of agency action is inaccurate. The court of appeals plainly applied the correct standard of judicial review. The petition raises only the issue whether the court below *misapplied* the correct standard of review in this particular case—an issue that does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951) ("power to review the correctness of application of the [proper] standard [of judicial review of agency action] ought seldom to be called into action"). Because, moreover, it is clear that the court of appeals correctly applied that standard in upholding EPA's rulemaking in this case, further review would be particularly inappropriate.

b. As stressed by the court of appeals (Pet. App. 7a-8a), EPA amply satisfied APA notice and comment requirements in its exhaustive investigation of the nonferrous metals industry prior to promulgating the final effluent limitations guidelines and standards. The agency gathered data from responses to questionnaires sent to 319 firms representing 419 facilities, and from plant visits, in-

dustry consultations, and scientific journals (*id.* at 8a). The agency prepared trip reports based on its follow-up on-site visits to specific plants, allowing those plants visited an opportunity to comment on the report (*ibid.*). The agency published proposed rules, made available record material in support of the proposal (48 Fed. Reg. 7032 (1983)), provided substantial time and opportunity for public comment, including a public hearing and a public workshop (A.R. 26928-26986), solicited additional data from industry through written communications (49 Fed. Reg. 8744-8755 (1984)), and remained in telephone contact with companies throughout (see, *e.g.*, Pet. App. 43a-45a). See generally *id.* at 8a. The resulting administrative record of 55,000 pages reflects the careful and considered attention EPA gave to what all must agree is a difficult statutory assignment. See *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 15-16 & n.24.

None of the specific claims petitioners renew in this Court suggests a contrary conclusion. Petitioners, for example, argue that EPA relied upon unreliable data in promulgating lead content effluent limitations guidelines (85-1748 Pet. 10-12). In particular, petitioners assert that "EPA improperly gave data [from a battery manufacturing plant] too much weight in promulgating the concentration limits," gave insufficient weight to industry data, and failed to identify a secondary lead plant currently capable of complying with the limitations (*id.* at 11-12). The court of appeals thoroughly considered and properly rejected these contentions (Pet. App. 24a-25a). The court of appeals correctly concluded that EPA's use of data from the battery manufacturing plant was "not unreasonable" because EPA had also relied on data based on the performance of plants with wastewater of lead concentration levels comparable to those of petitioners' plants (*ibid.*); see generally 49 Fed. Reg. 8751-8752 (1984)). The court

further concluded that EPA had not acted arbitrarily in rejecting other data submitted by petitioners because, as EPA had explained (Pet. App. 25a), petitioners had not shown that the data represented exemplary operation, as required by the Clean Water Act. Petitioners may continue to disagree with those conclusions, but their assertion that the court of appeals neglected to review and carefully consider their objections is groundless.

Petitioners' additional argument that the court of appeals failed to consider the absence of a showing that a secondary lead plant was currently meeting those limitations similarly lacks merit. It is well settled that the effluent limitations and standards petitioners challenge can be and were properly based on the performance levels which *other* industries have achieved by using the underlying treatment technology. See, *e.g.*, *Reynolds Metals Co.* v. *EPA*, 760 F.2d 549, 559 (4th Cir. 1985); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 645 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); *American Petroleum Inst.* v. *EPA*, 540 F.2d 1023, 1035-1036 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).[8]

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[8] The effluent limitations guidelines at issue are generally based on "best available [control] technology economically achievable" (see 33 U.S.C. 1311(b)(2)(A), 1314(b)(2)), which this Court has described as reflecting "a commitment of the maximum resources economically possible to the ultimate goal of eliminating all pollution discharges." *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 74-75 (1980). Petitioners mistakenly cite (85-1748 Pet. 11-12) *Tanner's Council of America, Inc.* v. *Train*, 540 F.2d 1188 (4th Cir. 1976), for the proposition that EPA must demonstrate that an existing secondary lead plant currently meets its promulgated BAT limitations (85-1748 Pet. 11-12). In *Tanner's Council*, the Fourth Circuit held merely that *some* existing facility should be meeting the effluent limitations; the court did not rule that one of the existing facilities in the particular industry category or subcategory to which the proposed effluent limitation will apply must already meet the limitation. 540 F.2d at 1192 n.10. Indeed, the court in *Tanner's Council* specifically held that EPA may establish effluent limitations guidelines and standards based on the perform-

Equally unpersuasive is petitioners' claim (85-1748 Pet. 12) that the court of appeals ignored their argument that EPA improperly relied on a filtration technology that the agency had considered and rejected when promulgating effluent limitations guidelines for other industries. The court of appeals directly addressed this argument and held that EPA had not acted arbitrarily (Pet. App. 22a-24a). The court stated that "such inter-industry comparisons are not determinative. The question is whether filtration should be required for the secondary lead industry, not whether it should be required for some other industry." Pet. App. 22a-23a (citations omitted).[9] The court in turn examined EPA's assessment of the costs of compliance in the secondary lead industry, including the economic impact of compliance, and concluded that EPA fully considered the costs of achieving effluent reduction as required by the Clean Water Act (*id.* at 23a-24a). Petitioners' claim that their arguments were ignored by the court of appeals and by EPA therefore is flatly contradicted by the record.

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ance of facilities in other industrial categories. *Id.* at 1192. That decision, therefore, is entirely consistent with the same court of appeals' decision in this case.

[9] As the court of appeals noted (Pet. App. 23a n.2 (emphasis added)), "that the agency *may* undertake such comparisons in establishing BAT for a particular industry poses no anomaly. * * * * * [There is] a difference in terms of the statutory purpose between an industry pleading comparisons as a basis for the most lenient guidelines and the agency utilizing comparisons in assessing [BAT]". In addition, EPA specifically found that larger quantities of the more toxic pollutants are removed by multimedia filtration in the secondary lead category than in other industries and that the use of filtration by secondary lead smelters would remove on an annual basis over one ton of toxic pollutants more than the next available, less stringent treatment option. See 49 Fed. Reg. 8762, 8767 (1984); A.R. 41742-41743, 44389-44438.

Petitioners' final two points of contention—(85-1748 Pet. 12-13) that the court of appeals gave short shrift to their claims that EPA's "cadmium limitation standards" were invalid and that EPA had violated APA notice and comment requirements—raise no issue requiring this Court's attention. With respect to the former, the court of appeals correctly held that petitioners' claim was not ripe (Pet. App. 25a-26a). EPA did not promulgate *any* cadmium limitations or standards applicable to secondary lead smelters and instead left their development and imposition to the permit-issuer or control authority in individual cases. Consequently, there are no cadmium limitations or standards for petitioners to challenge. If and when EPA chooses to promulgate cadmium limitations or standards on an industry-wide basis, or a permit-issuer or control authority decides to impose such limitations on a specific secondary lead facility, there will be ample opportunity for the facility to challenge any limitations or standards imposed. Petitioners' mere speculation that a permit-issuer might look to cadmium limitations applicable to other industries does not give rise to a justiciable controversy.

Petitioners' claim (85-1748 Pet. 13) that the court ignored EPA's violations of "fundamental principles of administrative law" in promulgating the lead limitations and standards lacks any record support. The court of appeals specifically held that EPA had "conducted its rulemaking in conformity with the [APA]" and the court, as discussed above, thoroughly reviewed petitioners' contentions that EPA had relied on erroneous data and improperly rejected industry data. Pet. App. 24a-25a, 32a. EPA, moreover, made publicly available the key methodologies and data underlying its lead limitations and standards, and twice reopened the public comment period to solicit additional public comment on those data and methodologies. See 48 Fed. Reg. 50906-50907 (1983); 48 Fed. Reg. 52604-52605

(1983). Petitioners' claim that EPA violated the APA by not notifying petitioners that the agency planned to discount certain industry data borders on the frivolous. Such a notice requirement would lead to a never-ending cycle of public notice and comment and thereby frustrate important statutory purposes, which, in the case of the Clean Water Act, Congress determined must be implemented by the agency within specified time deadlines.

c. In sum, petitioners' claim that the court of appeals applied the incorrect standard of judicial review is wholly insubstantial. The court clearly articulated the proper standard of review and applied that standard correctly in upholding EPA's rulemaking.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's ("EPA") brief in opposition ("Opp.") largely repeats and relies upon the errors of the court's decision below. It argues that EPA's revision of the proposed rules under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("Act") was insubstantial and one on which Petitioners had adequate notice and the opportunity to comment. It further contends that the decision of the United States Court of Appeals for the Fourth Circuit does not conflict with those of other circuits. Finally, EPA urges that the case is simply a factual dispute about the adequacy of notice and consequently raises no significant legal issues.

1. The Revision Was Substantial

EPA attempts to minimize the significance of the revision to its proposed rules by claiming that Petitioners' complaint is not directed to any change

in the effluent limitation standards, but to the "addition of a supplemental control technology" which industrial dischargers, such as Petitioners, are not required to adopt (Opp. p. 6). Such an argument is utterly disingenuous, in light of the Act's requirements that effluent limitations be "technology-based."[1] The statutory scheme contemplates the selection by EPA of an appropriate technology which will permit dischargers to attain the effluent standards being established.

In the instant case EPA proposed certain effluent standards, the achievability of which were to be based on the "lime precipitation, settle and filter treatment technology" (LS&F). Comments of Petitioners persuaded EPA that the standards being set were unachievable under the LS&F technology. It then adopted a new and different technology - sulfide precipitation - to support its proposed standards. Petitioners were denied the opportunity of addressing whether the standards were achievable under the sulfide precipitation technology.[2]

Since it is the technology that determines the final standards, any change in the technology obviously has a material impact upon the standards being proposed and constitutes a fundamental change in the proposed rules. It is true that the Act does not expressly direct a discharger to adopt a particular technology, but if no technology exists to support the standards, such

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[1] EPA notes correctly in its Opposition that under the Act, "Congress authorized EPA to establish *technology-based* effluent limitations and standards for categories of industrial dischargers" (Emphasis added) (Opp. p. 2).

[2] See Appendix pp. 40a-45a.

standards cannot be met;[3] and their adoption by the EPA is unlawful.

2. Petitioners Were Not On Notice That A Technology Other Than Those Specified In The Federal Register Was Under Consideration

EPA does not dispute the fact that the sulfide precipitation technology was not one of those specifically identified in the Federal Register as being relied upon for the proposed rules and upon which public comments were sought. Instead, it argues that since the Federal Register alerted the public that chemical precipitation, which includes sulfide precipitation, was under consideration and EPA sought comments on other effective treatment technologies, adequate notice had been given (Opp. p. 6). Chemical precipitation is far too general a term, including as it does many technologies,[4] to satisfy the "reasonable specificity" requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). Similarly, the general invitation to submit other proposals or technologies did not afford Petitioners the requisite notice that the specifically identified technologies would be changed to sulfide precipitation. *National Black Media Coali-*

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[3] This procedure, which violates the Clean Water Act, of selecting the limits before determining the proper technology was used by EPA in establishing all the 40 C.F.R. Part 421 Subpart E, G, H and I regulations. The Fourth Circuit refused to consider this issue which was raised by Petitioners in the court below. See Petition, p. 7, n. 7.

[4] Chemical precipitation was not included in the Federal Register list of six technologies being considered by EPA in this rulemaking. See 48 Fed. Reg. 7047 (1983).

tion v. *Federal Communications Commission*, 791 F.2d 1016, 1022-1023 (2nd Cir. 1986). And the lack of notice is emphasized by the absence in the voluminous comments of any suggestions that sulfide precipitation should be considered as an alternative treatment technology. *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981).

EPA relies heavily upon its discussion of sulfide precipitation in the draft Development Document accompanying the proposed rules as satisfaction of the notice requirements of the APA (Opp. pp. 6-7). If sulfide precipitation were so important and reliable a technology as EPA now attempts to portray, why was it not identified as being one of the six technologies specifically listed in the Federal Register as being considered under the proposed rule? Its absence from the proposed rule and the specifically identified list of six technologies, like that of twenty other technologies discussed in the 2100 page Development Document, clearly caused Petitioners to believe that it was not regarded by EPA as one of the technologies upon which effluent standards would be based.

EPA suggests that even if sulfide precipitation were not specifically identified in the proposed rule published in the Federal Register, Petitioners' comments on the draft Development Document reveal they were on actual notice of sulfide precipitation as a possible alternative technology (Opp. p. 7). Petitioners' comments, however, were *limited* to the draft Development Document's discussion of the *six technologies* identified in the proposed rule. The limited nature of Petitioners' comments highlight their lack of actual notice and why a Development Document is not a

substitute for notice in the Federal Register.

3. Petitioners Were Denied The Opportunity To Challenge EPA's Final Choice Of A Technology

EPA contends that Petitioners were not denied an opportunity to challenge EPA's adoption of sulfide precipitation as a technology since the court of appeals considered their objections to that control method (Opp. p. 8). EPA's argument places the cart before the horse. It is the agency with its expertise, and not a reviewing court that must first consider and rule upon objections to a proposed regulation. Indeed, objections must first be raised with the agency before a court will even consider them. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973). The statutory rulemaking scheme is predicated on the initial evaluation by the agency of public comments and objections. Without such an administrative record a reviewing court is not in a position to make a reasoned and informed judgment on agency action.

Not only did EPA refuse to permit Petitioners to comment upon the sulfide precipitation technology during the rulemaking process,[5] but it successfully opposed Petitioners' attempt to supplement the record and address such control method in their briefs to the court of appeals (App. pp. 52a; 55a-56a).[6] With-

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[5] When the final regulations were issued March 8, 1984, Petitioners had not received a copy of crucial analytical data from EPA. The information was not obtained until months after the regulations were issued, and then after a Freedom of Information Act request was filed (App. pp. 47a-49a).

[6] Petitioners sought to place before the court of appeals data from the same foreign plant relied upon by EPA which would

(*footnote continued*)

out the benefit of Petitioners' comments on sulfide precipitation before the EPA or the supplemental data they sought to bring to the court's attention, the court below was in no position to determine the reasonableness and legality of EPA's prescribed effluent standards.

4. The Decision Of The Court of Appeals Conflicts With Those Of Other Circuits And Its Own Prior Decision

EPA attempts to distinguish the cases cited by Petitioners which show that the decision below conflicts with decisions of other circuits and one of its own decisions.[7] The Agency argues that, unlike those decisions, the revision in issue here did not fundamentally alter the proposed rule. But as demonstrated above, EPA did in fact make a basic and substantial change in the rule by adopting a technology that was never subject to notice and comment.

EPA also claims that notice of sulfide precipitation was not supplied by a comment, but by notice in the Federal Register and draft Development Document, and thus its adoption as a technology was a "logical outgrowth" of the original proposal. However, as noted above sulfide precipitation was not identified as one of the technologies under consideration in the Federal Register; and reference to a large number of

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demonstrate that sulfide precipitation could not achieve the prescribed standards. They were also prepared to show that EPA had been informed during the rulemaking that the samples at the foreign plant were not representative of long-term performance.

[7] *American Federation of Labor and Congress of Industrial Organizations* v. *Donovan*, 757 F.2d 330 (D.C. Cir. 1985) and *Chocolate Manufacturers Ass'n.* v. *Block*, 755 F.2d 1098 (4th Cir. 1985).

additional technologies in a draft Development Document without any indication they were being considered as possible alternative control methods does not meet the requirements of the APA.

Furthermore, while the comments did not mention sulfide precipitation - a clear indication of lack of notice to Petitioners - they clearly did trigger EPA's adoption of a seventh and new technology, as both the court below found (App. p. 15a) and EPA concedes (Opp. p. 9). If courts do not allow agencies to escape the notice requirements of the APA by basing a revised rule on the substantive contents of comments, then *a fortiori* an agency cannot claim notice where the comments do not even discuss the technology subsequently adopted, but cause the agency to take different action than initially proposed.

In addition to the cases cited in the Petition for Writ of Certiorari, the decision below is also in conflict with a more recent decision of the Second Circuit - *National Black Media Coalition et al.* v. *Federal Communications Commission*, 791 F.2d 1016 (2nd Cir. 1986). There, in circumstances very similar to those here, the court held that an invitation to "submit other proposals" and "the comments of other interested parties" did not provide adequate notice when the final rule differed significantly from the proposed rule, and was based on information not available to the public (*id.* at 1022-1023).

5. The Petition Raises Significant Legal Issues

EPA attempts to dismiss this case as one involving only a factual dispute on the adequacy of notice and not any significant legal issues. The issues in this

case, however, transcend the particulars of the rulemaking proceeding under challenge, for they raise the recurring question of what obligation an agency has under Section 4 of the APA to give notice and opportunity for comment on a rule that substantially differs from what was originally proposed. The question "will ultimately require interpretation of important statutory language by this Court" *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096, 1098 (1980) (Rehnquist, J., dissenting). And the question is an especially important one in the Environmental Law area where the statutory schemes rely heavily upon meaningful participation in rulemaking proceedings and usually provide little or no opportunity for adjudicatory hearings, *e.g.* Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and Safe Drinking Water Act, 42 U.S.C. §§ 300 F *et seq.*

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

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IN THE

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OCTOBER TERM, 1985

No. 85-1741

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST[1]

This case presents the Court with a critical question of administrative law that continues to generate conflicting lower court opinions on when an agency, which substantially changes a final rule from what it originally proposed in the Federal Register, must provide a second round of notice and comment in order to comply with § 553 of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553 (1977). Justices Rehnquist and Powell recognized the importance of this question and the need

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.1. The parties' consent letters have been filed with the Clerk of this Court.

to resolve it in their dissent to the denial of certiorari in *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096 (1980).[2] In that case, the lower court held that promulgation of the substantially changed rule did not require additional notice and opportunity to comment because the final rule was the "logical outgrowth" of comments received during the public comment period. *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637 (1st Cir. 1979).

Since then, in partial fulfillment of the dissent's prophecy, several other decisions have added to the confusion in the circuits on when to require a second round of notice and comment prior to adopting a substantially different final rule. At least three different versions of the "logical outgrowth" test have emerged, each focusing on a different source from which the final rule must logically grow.

The logical outgrowth test used by the Fourth Circuit below adopts the *BASF Wyandotte* approach to determining when a second round of notice and comment must be provided. This approach is particularly egregious because it focuses *solely* on whether the final rule was revised in response to *comments* on the proposal, and fails to consider whether the *proposal itself* initially gave interested parties adequate notice of the subjects and issues covered in the final rule. Its application invariably results in decisions like the one below, where the Fourth

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[2] "This case presents an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under [§ 553], or similar provisions in new Acts of Congress for review of agency action. . . . That question is the degree to which an agency, which publishes a rule for notice and comment . . . very substantially changes the rule in response to the comments it receives, is obliged to publish the revised rule to allow another opportunity for notice and comment . . . [W]hen we consider the very significant effect that a "rulemaking" procedure may have upon the parties involved . . . , I think this Court should grant certiorari to examine the question." *Id.* at 1097-1098.

Circuit ignored the fact that the agency's choice for the final rule was not even included among the specified alternatives listed in the Federal Register notice.

This version of the logical outgrowth test adversely affects anyone wishing to comment on proposed regulations. Notice and comment rulemaking is one of the key elements of the business community's ability to adapt to an everchanging regulatory environment. By requiring a nexus between only the final regulations and the comments received, this test stands the APA on its head. It shifts the burden of providing notice from the agency to the regulated community, requiring interested persons to determine for themselves the subjects and issues of the rulemaking.

As the nation's largest federation of businesses and business organizations, the Chamber of Commerce of the United States ("Chamber") is particularly disturbed by the Fourth Circuit's approach in this case. The Chamber represents more than 180,000 companies, trade and professional organizations, and state and local chambers of commerce, and often participates on their behalf in rulemakings [3] and in challenges to rulemakings.[4]

The practical implications of the decision below are overwhelming. Unless rejected by this Court, this theory for determining logical outgrowth will force the regu-

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[3] *See e.g.*, Comments of the Chamber of Commerce of the United States on *EEOC Notice of Proposed Rulemaking: Administrative Exemption Allowing for Waivers Under the ADEA, 50 Fed. Reg. 40,870* (Oct. 7, 1985); *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (Dec. 21, 1984); *Advance Notice of Proposed Rulemaking, 40 C.F.R. 765, Formaldehyde: Determination of Significant Risk* (July 23, 1984).

[4] *See e.g., Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980) (whether OSHA's promulgation of a legislative rule having substantial impact, without giving interested persons advance notice and opportunity for comment, violated § 553 of the APA).

lated community to research voluminous administrative records to obtain "notice" of what the Chamber believes is the statutory duty of the agency to provide.[5] For these reasons, the Chamber urges the Court to grant certiorari in this case, and resolve the conflict in the circuits over the proper use of this test.

STATEMENT OF THE CASE

This case arises out of a lawsuit challenging certain Clean Water Act regulations on the grounds that the Environmental Protection Agency ("EPA" or "Agency") violated the Administrative Procedure Act when it promulgated substantially different regulations from those originally proposed in the Federal Register, without providing additional notice and opportunity for comment.[6] The notice of proposed rulemaking listed six pollution control technologies being considered by the Agency.[7]

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[5] The Federal Register proposal in this case comprised 94 pages out of a 55,000-page administrative record. (Petition for Certiorari at 5). In 1985, the Environmental Protection Agency alone published 1,878 entries in the Federal Register alone, amounting to 5,494 "billable" pages, which is roughly equal to 4,500 full pages of text. (Government Printing Office statistics).

[6] Section 304 of the Clean Water Act, 33 U.S.C. §§ 1251, 1317, requires EPA to set industry-wide water pollution standards, called "effluent guidelines." The effluent guidelines at issue in this case were promulgated for the non-ferrous metal manufacturing industry.

[7] Section VII of the preamble to the proposal, entitled "Available Wastewater Control and Treatment Technology," contained three subheadings: A. Control Technologies Considered; B. Status of In-Place Technology; and C. Control and Treatment Options, which listed the six options ("EPA considered the following treatment and control options . . . for facilities with the nonferrous metal manufacturing category: . . . ."). 48 Fed. Reg. 7046-7047 (Feb. 17, 1983). Section XXIV of the preamble, entitled "Solicitation of Comments," specifically invited the submission of data from facilities "using the treatment technologies *relied upon for this regulation*, and also other equally effective treatment technologies." *Id.* at 7073 (emphasis added).

The final rule, however, imposed a seventh technology selected from EPA's 2200-page Development Document, an encyclopedic compendium of technologies and background material, which was never published in the Federal Register. The Petitioners challenged the final regulations on the issue of adequate notice and opportunity to submit data on the seventh technology. The Fourth Circuit rejected this argument, suggesting that Petitioners should have been aware of the seventh technology because "EPA actually did discuss [it] in the Development Document, which *accompanied* the Proposed Rules . . . ." *Kennecott* v. *United States*, 780 F.2d 445, 452 (4th Cir. 1985) (emphasis added). Endorsing EPA's characterization of the final rule as a " 'natural and logical outgrowth' of the commenting procedure," the Fourth Circuit held that the agency did not violate the APA when it added the new technology "in an attempt to respond to industry comments and complaints." *Id.* at 453.

REASONS FOR GRANTING THE WRIT

I. CONFLICTING TESTS FOR DETERMINING WHETHER AGENCIES MUST PROVIDE A SECOND ROUND OF NOTICE AND COMMENT GENERATE WIDESPREAD CONFUSION OVER THE SCOPE OF SECTION 553 OF THE APA

Section 553 establishes the general statutory framework for informal rulemaking. It requires federal agencies to publish notice of proposed rulemaking in the Federal Register, and to include in the notice "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). After the required notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without the opportunity for oral presentation." *Id.* at § 553(c).

Informed public notice and meaningful opportunity to comment on proposed rules are fundamental requirements

of administrative law.[8] Whether and how well an agency meets these requirements depends largely on how the courts interpret § 553. Conflicting judicial interpretations of what the APA requires when an agency publishes a final rule that substantially differs from its proposal raise serious questions about the adequacy of agency rulemaking procedures. The recurring nature of these questions and the breadth of their impact call for immediate resolution by this Court.

A. A Single Test For Determining When An Agency May Promulgate Substantially Different Final Rules Without Providing A Second Round Of Notice And Comment Will Guarantee Meaningful Public Participation And Ensure Consistent Results For The Entire Regulated Community

This Court recognized the very significant effects that a "rulemaking" procedure may have upon interested parties in *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). The impact of the rulemaking procedure at issue here is equally pervasive. It extends far beyond these EPA regulations and the metal manufacturing industry challenging them, and adversely affects all parties and agencies regulated under § 553 of the APA.

Action by this Court to establish a single test for determining logical outgrowth would allow all courts to take a uniform approach when interpreting the requirements of § 553. Besides giving the regulated community an understanding currently absent from the law, uniformity would ensure that litigation regarding the scope of the logical outgrowth test would not recur each time an agency substantially changes a final rule.

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[8] *See, Chamber of Commerce of the United States*, 636 F.2d at 472 (Bazelon, J., concurring) ("advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era"). *See generally*, K. Davis, *Administrative Law Of The Seventies*, § 6.01-1 (1976).

B. The Logical Outgrowth Test Adopted Below Is Unfair And Conflicts With At Least Two Other Tests For Determining Sufficient Notice

The logical outgrowth test used by the court below is one of three tests which have emerged from the courts of appeals for determining whether a second round of notice and comment should be required. The fundamental difference between these tests is the way they measure "outgrowth." The Fourth Circuit focuses only on the comments submitted during the comment period.[9] Accordingly, an agency may make substantial changes to its original proposed rule without providing an additional notice and comment period if the changes are a logical outgrowth of the comments received. *Accord, BASF Wyandotte Corp.*, 598 F.2d 637.[10]

Other courts, and even another opinion in the Fourth Circuit, expressly reject the use of comments received to

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[9] The court specifically noted that sulfide precipitation was not listed in the Federal Register proposal: "EPA listed six control and treatment options in the proposed rules; sulfide precipitation was not among them." *Kennecott*, 780 F.2d at 452.

[10] There, the First Circuit warned, "It should be clear to commentators when they criticize a regulatory scheme that if the agency accepts those criticisms a new scheme will be substituted . . . [T]hough EPA's solution was not the one for which the industry argued, it was suggested by and, in part, a logical outgrowth of the industry's comments. They cannot now complain because they misread the regulatory waters [and] incorrectly anticipated how EPA would react to their criticisms." *BASF Wyandotte Corp.*, 598 F.2d at 643. *See* note 2 and accompanying text, *supra*. *See also International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973) ("In part, EPA developed its methodology on the basis of submissions made by the companies at the hearing . . . The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.").

measure logical outgrowth.[11] They instead focus their examination of the final rule on either the proposed rule as published in the Federal Register,[12] or a combination of the proposal and the comments submitted.[13]

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[11] *See e.g., Small Refiners Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("As a general rule, EPA must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus notice necessarily must come—if at all—from the agency."); *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239, 1249 (D.C. Cir. 1981) ("While an absence of comments in no way implies inadequate notice, it does alert us to that possibility."); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972) ("The absence of comments from such groups may well be because the notice of rulemaking never advised of this subject or issue."). Even a prior Fourth Circuit decision cited by the court rejected this approach. *See Chocolate Manufacturers Ass'n* v. *Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) ("An agency, however, does not have a carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the public comment period.").

[12] *See e.g., AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) ("A determination of whether notice was adequate in this case turns, then, on an examination of the notice which the secretary provided in relation to the final rule which was ultimately adopted."); *Taylor Diving & Salvage Co., Inc.* v. *U.S. Department of Labor*, 599 F.2d 622, 626 (5th Cir. 1979) ("It is not necessary, however, for the final form of a regulation to be republished . . . where the proposed regulation, in its initial form, gives sufficient notice to interested parties of the Secretary's intentions . . . Here, . . . the contested provision in the standard finally promulgated was a logical outgrowth of provisions found in the standard originally proposed."). *Accord, United Church Board for World Ministers* v. *SEC*, 617 F. Supp. 837, 840 (D.D.C. 1985) ("Failure to make agency views known at the time of publication of notice circumvents the purpose of the APA notice requirements. Proposed rule changes cannot be "tested" when the public is unaware of both the proposed revision and the theory under which the agency makes its proposal.").

[13] *See e.g., United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n* v.

Of these three approaches,[14] the one adopted by the Fourth Circuit is the most unfair and burdensome to the public. Measuring logical outgrowth from comments received fails to consider whether the proposed rule initially provided adequate notice of the subject and issues covered in the final rule. This approach undermines the rulemaking process, and denies interested parties their right to comment on important aspects of a rule prior to final promulgation. It also turns the APA on its head, using the comment period as a substitute for an agency's failure to satisfy its statutory obligations. Comments submitted during the public comment period should not be confused with notice from the agency. As succinctly put by one court, only an agency can provide notice; "it

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Donovan, 453 U.S. 913 (1981) ("We must proceed to compare carefully the specific language of the proposal with that of the final rule, in light of the evidence adduced at the hearings."); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 658 (1st Cir. 1974) ("Although the changes were substantial, they were in character with the original scheme and were additionally foreshadowed in the proposals and comments advanced during the rulemaking."). *Accord, Rowell* v. *Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1980) ("[T]he Agency's final conclusions are far from the 'logical outgrowth' of the preceeding notice and comment process. . . .").

[14] One commentator has identified yet a fourth test: whether the final rule is a logical outgrowth of agency statements published in the notice of proposed rulemaking. *See*, Rochvarg, *Adequacy of Notice of Proposed Rulemaking under the Administrative Procedure Act—When Should a Second Round of Notice and Comment be Provided?*, 31 Am. U. L. Rev. 1, 8 (1981). *But cf.*, Comment, *The Need for an Additional Notice and Comment Period when Final Rules Differ Substantially from Interim Rules*, 1981 Duke L. J. 377 (1981) (does not recognize agency statements in preamble as a separate test). *See also* Note, *Toward a More Complete Notice of Proposed Rulemaking: A Judicial Overiew* [*sic*] *and Suggestions for Change*, 84 W. Va. L. Rev. 227, 246-252 (1981) (the relationship between the "hard look doctrine" and sufficiency of notice); Rochvarg *supra*, at 18-23 (use of the "harmless error approach" as an alternative test for deciding whether to provide additional notice and comment).

cannot bootstrap notice from a comment." *Small Refiners Lead Phase-Down Task Force*, 705 F.2d at 549.

The Fourth Circuit's application of this version of the logical outgrowth test is particularly egregious because no comments were even filed on sulfide precipitation as a possible treatment technology. Instead, the court held that EPA's selection of sulfide was the logical outgrowth of the negative comments received on the six treatment options listed in the notice of proposed rulemaking. Moreover, the court suggested that EPA had further discharged its statutory obligation to provide notice by discussing sulfide precipitation, along with over twenty-five other treatment technologies, in a document not even published in the Federal Register.[15] According to this approach, an interested party could protect its right to participate meaningfully in a rulemaking only by searching the docket for clues of agency intent and commenting on every technology discussed in a Development Document.[16] And such a party would have no way to protect its right to receive meaningful prior notice of the agency's proposal.

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[15] In *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239 (D.C. Cir. 1981), the court invalidated as "hardly the 'logical outgrowth' of the rulemaking" a final rule developed from methodology cited in a footnote to an unpublished appendix to the proposed rule. The court held that "if a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register." *Id.* at 1250. *See also, National Black Media Coalition* v. *FCC*, No. 479 (2d Cir. May 27, 1986) (agency reliance on maps and studies not disclosed throughout the proceedings denied parties the opportunity to comment on their methodology or conclusions, and therefore the final rule was not a logical outgrowth of the proposed rule).

[16] Yet, as noted by the court in *Small Refiners Lead Phase-Down Task Force*, 705 F.2d at 550, "[n]othing in the text or legislative history of the [Clean Air Act] hints that Congress intended to require private parties to scrutinize the record for notice of issues that the agency did not raise itself." Nor are there any such hints in the text or legislative history of § 553 of the APA.

C. A Single Test Will Eliminate This Erratic Approach To Applying The Logical Outgrowth Test And Avoid Recurring Litigation Every Time An Agency Substantially Changes A Final Rule

The conflicting versions of the logical outgrowth test outlined above demonstrate an erratic approach to interpreting § 553 of the APA that utterly fails to provide the regulated community and the courts with a workable degree of guidance on when an agency must provide a second round of notice and comment. The Chamber urges this Court to put an end to this continuing conflict by establishing a single logical outgrowth test that complies with the notice and comment provisions of the APA, and ensures meaningful public participation in agency decisionmaking.

The test adopted by the court below imposes unreasonable burdens on interested parties and severely restricts their rights under the statute. The Chamber urges the Court to reject this approach and instead to adopt a test which measures logical outgrowth only from the proposed rule as published in the Federal Register. Such a test would respond to the regulated community's need for guidance and reduce the multiplicity of litigation that continues to occur every time an agency promulgates a substantially different final rule.

CONCLUSION

For these reasons stated above, this Court should grant the petition for certiorari.

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No. 85-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, AMAX, INC., ASARCO INCORPORATED, ST. JOE MINERALS CORPORATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

BRIEF OF ALUMAX, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

BRIEF OF ALUMAX, INC, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Alumax, Inc. ("Alumax")[1] respectfully submits this Brief of Amicus Curiae in support of the petition for a writ of certiorari.[2] Alumax is an integrated producer of aluminum and aluminum products. Its operations are subject to a broad range of federal laws and regulations, including those administered by respondent Environmental Protection Agency. Alu-

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[1] Alumax is a publicly held company. Alumax is affiliated with petitioner AMAX, Inc. in that AMAX, Inc. owns 50% of Alumax's outstanding stock.

[2] Pursuant to Rule 42, the written consent of the parties is filed concurrently with this brief.

max frequently participates in federal administrative rulemaking proceedings and consequently has a substantial interest in the process by which federal regulations are developed under the Administrative Procedure Act.

ARGUMENT

I. Summary of Argument

A. Introduction

This case, reported below as *Kennecott v. EPA*, 780 F.2d 445 (4th Cir. 1985), presents an issue of fundamental importance under a major federal environmental statute and the governing procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). The case arises out of petitions to review national standards (known as effluent limitations guidelines) set by the Environmental Protection Agency ("EPA" or "Agency") for the nonferrous metals industry in a rulemaking proceeding under the Clean Water Act, 33 U.S.C. §§ 1251-1376; 40 C.F.R. § 421.

In proposing these effluent limitations EPA sought comment on six specific technologies for the control of water pollution effluents. The Clean Water Act requires limits to be based on the best technology achievable, taking certain factors into consideration. After receiving comments on the proposed technologies, and determining that industry would not be able to meet proposed limits with those technologies, EPA decided to adopt and promulgate regulations based on a substantially different technology, sulfide precipitation, about which the public had not been placed on notice, and that had not been the subject of any comment.

Several parties filed petitions for review of the regulations in the United States Court of Appeals for the Fourth Circuit, pursuant to 33 U.S.C. § 1369(b), and the Fourth Circuit upheld EPA's action. In so doing, the Court merely deferred to the Agency's claimed expertise, and failed to hold the Agency to the notice and fairness requirements of the APA. Since the technology adopted by EPA was never exposed to comment because of lack of notice, the court based its determination on a fatally deficient administrative record and thus was not in a position to determine whether the rule was the product of an informed and reasoned judgment.

B. The EPA Rulemaking Proceeding

The Clean Water Act requires the national effluent guideline regulations to "identify . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable." 33 U.S.C. § 1314(b)(2)(A). In promulgating these regulations, EPA must identify the best control measures and practices achievable, and then based on the technology chosen, set the actual discharge limits. The identification of the control measure is the crucial step because the actual effluent limits are, by statute, based on the particular technology selected. Although the control technology from one industry may be "transferred" to another if the processes are similar, EPA may choose to have different discharge limits for the two different industries.

On February 17, 1983, EPA, pursuant to section 304 of the Clean Water Act, 33 U.S.C. § 1314, proposed twelve sets of nationally applicable effluent guideline regulations for "Nonferrous Metals Manufacturing." In the rulemaking at issue, EPA published

in the *Federal Register* proposed effluent limitations and specified the six pollution control technology options it was considering, and it requested specific comments on them or any other alternative technologies.[3]

Following the publication of notice in the *Federal Register*, EPA distributed a proposed Development Document, not published in the *Federal Register*. That 3-volume, 2100 page document generally identified 25 existing treatment technologies, including a process known as sulfide precipitation. The *Federal Register* notice specified the six particular technologies being considered, and it set forth the limits those technologies could achieve. Sulfide precipitation was never mentioned in that notice.

At no time following the distribution of the proposed Development Document was sulfide precipitation mentioned as an alternative or supplement to the six options, nor did any of the voluminous comments submitted discuss sulfide precipitation.

C. Decision Below

In denying the petitions for review, the Fourth Circuit rejected the claim that the petitioners had not

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[3] The proposal included a list of both "in-process" systems and "in-place" systems considered for proposal, and then specified the six "control and treatment options" that were selected for final consideration, and requested comments on those. "The Agency specifically requests long-term sampling data (especially paired raw wastewater-treated effluent data) from nonferrous metals manufacturing plants having well-operated treatment systems using the treatment technologies relied upon for this regulation, and also other equally effective treatment technologies." 48 Fed. Reg. 7073 (1983).

been placed on notice of the new technology and held that they "should reasonably have known that EPA was considering sulfide precipitation." 780 F.2d at 452. Although the court recognized that sulfide precipitation was not one of the six control and treatment options identified in the *Federal Register* notice of the proposed rule, the court noted that the preamble to the proposed rules "specifically asked for comments on alternative treatment technologies." *Id.* Moreover, the court noted that EPA's associated Development Document "included both lime and settle and sulfide precipitation in its discussion of effective chemical precipitation methods." *Id.* The Fourth Circuit relied on the "logical outgrowth" rule and concluded that "EPA did not violate the requirements of the Administrative Procedure Act when, in an attempt to respond to industry comments and complaints, it added sulfide precipitation as a supplement to the Best Available Technology on which its effluent limitations were grounded." *Id.* at 453.

The Fourth Circuit's opinion evidences no inquiry into the administrative record, but defers entirely to the technical information in the Agency's brief. This deference led the court to accept the Agency's position that sulfide precipitation was simply the addition of a second step to the "lime, settle and filter" technology, that it could be transferred to Petitioners' plants from experience gained outside the industry, and that it is a "more effective treatment than the conventional lime and settle process. *Id.* These determinations were based solely on EPA references in the 55,000 page Record, none of which were contained, or referred to, in the *Federal Register* notice.[4]

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[4] The court also denied a Motion of Petitioners to Supplement

II. The Fourth Circuit Did Not Review The Agency's Actions

A. The Fourth Circuit Misinterpreted the Notice Requirements of the Administrative Procedure Act

Section 4 of the Administrative Procedure Act requires that the notice in the *Federal Register* of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). It is well-settled that this notice requirement benefits both the public and the agency involved, *National Tour Brokers Ass'n. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), by encouraging public comment and testing the rules, providing a fair opportunity for all views, and creating a record for judicial review, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1271 n.54 (9th Cir. 1977). Due to the large volume of technical data involved, it is especially important that adequate notice be given in an EPA rulemaking. It is essential for EPA to identify issues and related data with "reasonable specificity" in order to avoid an "elaborate treasure hunt,

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the Administrative Record. In so doing, the court also denied petitioners the opportunity to include in the Record long-term data from a foreign plant (relied upon by EPA) showing that sulfide precipitation would not achieve the prescribed limits; evidence of a meeting between representatives of EPA and the foreign plant (prior to the promulgation of the regulations) in which EPA representatives were told that EPA samplings from that plant were not representative of long-term performance; and petitioners' estimates of the costs of sulfide precipitation. None of this information was considered by the Agency since no comments mentioned sulfide precipitation and no supplemental comments had been allowed on sulfide precipitation after the close of the comment period.

in which interested parties, assisted by high-priced guides (called 'lawyers'), must search the record for the buried treasure of a possibly relevant comment." *Small Refiner Lead Phase-Down Task Force v. EPA, supra*, 705 F.2d at 550. Although the Fourth Circuit opinion pays lip service to the necessity of providing notice "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking," 780 F.2d at 452, citing *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985), it erroneously interpreted what constitutes adequate notice.

The Court of Appeals based its suggestion that petitioners below "should reasonably have known that EPA was considering sulfide precipitation" on two factor: (1) "EPA specifically asked for comments on alternative treatment technologies" in the preamble to the proposed rules; and (2) EPA's associated proposed Development Document mentioned sulfide precipitation among the twenty-five treatment methods identified as effective precipitation methods. 780 F.2d at 452. The suggestion that the Agency's request for "alternative treatment technologies" alone should have placed the public on notice that sulfide precipitation was under consideration, in spite of the fact that it was not mentioned among the six control and treatment options listed in the *Federal Register* notice of February 17, 1983, flies in the face of the APA's requirement that the notice be sufficient to give the public a fair opportunity to comment and participate in the rulemaking. The lack of notice is reflected in the fact that in the comments received, no party even suggested such a technology. The absence of any comments on sulfide precipitation demonstrates the lack

of adequate notice,[5] particularly in light of the substantial comments received by EPA.

The court's reliance upon the proposed Development Document as a source of notice that sulfide precipitation was under consideration is equally misplaced. The 2100 page proposed Development Document was not included in the *Federal Register* notice. The proposed Development Document included a list of more than twenty-five existing water treatment technologies. Sulfide precipitation was one of the technologies discussed, but it was not identified as one of the options under consideration as a proposed model technology. The effect of the Fourth Circuit's decision places an enormous burden on commenters, requiring them to address every detail of a massive, technically complex Development Document despite the fact that the Agency's *Federal Register* notice specified the technologies under consideration.

B. The Fourth Circuit Misinterpreted the "Logical Outgrowth" Rule

The Fourth Circuit also agreed with EPA that the adoption of sulfide precipitation technology was a "logical outgrowth" of the original proposal. 780 F.2d at 452. Under this rule, substantial changes in "the original plan may be made as long as they are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment already given." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980),

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[5] See American Frozen Food Institute v. Train, 539 F.2d 107, 135 (D.C. Cir. 1976) which states "the importance of the issue was belied by the obscurity of the footnote intended to give notice, (and) by the lack of meaningful comment."

citing *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974). The final rule must be a logical outgrowth of the Agency's proposal, and not a response to comments or complaints; a substantial change in a proposed rule based on the comments is not permitted without further notice and opportunity to comment. Clearly, the Agency's proposal must be the source of the notice of a regulatory proposal, comments by other parties do not satisfy that obligation. *National Black Media Coalition v. FCC*, No. 85-4121, slip op. at 3688 (2d Cir. May 27, 1986); *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, *supra*, 705 F.2d at 549. *See also Taylor Diving & Salvage Co., Inc. v. Dept. of Labor*, 599 F.2d 622 (5th Cir. 1979); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972).

Nevertheless, the court below permitted EPA to rely on comments rejecting the six proposed technologies in introducing an entirely new technology about which there had been no notice in the *Federal Register*. Petitioners below could not have been alerted, much less responded to, any changes in the rule prompted by the comments, since neither the proposal nor the comments even mentioned sulfide precipitation. The Fourth Circuit adopted the EPA position on sulfide precipitation which was developed entirely without public input or scrutiny; moreover, the court refused to consider industry data on sulfide precipitation at the time of the petition for review. *See* f.n. 4, *supra*.

The decision below extends the logical outgrowth rule one step too far. In accepting EPA's addition of sulfide precipitation, the court concluded that the ad-

dition was "an attempt to respond to industry comments and complaints."[6] The court also noted that the "comments led EPA to reexamine its selections of model technologies and data basis" and observed that such changes can be a " 'logical outgrowth' of the original proposal and the notice and comments upon it." 780 F.2d at 453. However, none of the comments upon which EPA relied in switching to sulfide precipitation endorsed or even mentioned this alternative technology. Rather, the comments described the failings of the six technologies listed in the *Federal Register* notice. This in not an appropriate basis for permitting EPA to introduce an entirely different technology upon which *no* comment was received.

The court compounded its error by failing to remand the rulemaking to EPA to provide an opportunity to comment on sulfide precipitation and its refusing to permit petitioners below to supplement the administrative record. Absent any public comment on sulfide precipitation the court was not in a position to accept EPA's contentions that sulfide precipitation technology was simply an incidental supplement to "lime, settle and filter;" that sulfide precipitation could achieve the prescribed effluent limits; and that use of the technology in other industries could be validly transferred to the U.S. nonferrous metals in-

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[6] These comments and complaints demonstrated that the six proposed technologies were not appropriate for the specific limits in the regulations. Rather than acknowledge the comments, the Agency rejected all petitioners' data and invoked a new technology to justify its preconceived limits.

dustry.[7] In short, the court did not have a sufficient administrative record upon which to make a reasoned and informed judgment.

The decision below imposes enormous burdens on those who must comment on proposed regulations. It permits EPA or any administrative agency to fulfill the notice requirements of the APA merely by including material in a voluminous Development Document or anywhere else in the record without notice in the *Federal Register*. This permits (in the words of the Fourth Circuit) "ambushing" those who have not addressed all the items described therein. For instance, in the effluent guidelines rulemaking at issue here, commenters would have been compelled to submit data on 25 different pollution control technologies after obtaining the proposed Development Document, which was not contained in the *Federal Register*. The APA does not countenance such administrative slight of hand, which focused attention on one set of technologies only to have the agency adopt an entirely different technology. Such a procedure would frustrate and preclude meaningful comment in the rulemaking process. It would also increase the costs dramatically for those who wish to participate in informal rulemaking proceedings since the entire record becomes subject to comment regardless of what is specified in the *Federal Register* notice.

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[7] See also 780 F.2d at 452-53 where the court makes further specific findings with regard to technical and process matters presented in the EPA brief without any support from material in the administrative record.

III. The Decision Below Creates A Conflict Among The Circuits

The Fourth Circuit's interpretation of "logical outgrowth," in the decision below also conflicts with those of other Courts of Appeal. As discussed *supra*, the Fourth Circuit held that a substantial change in a proposed rule induced by comments or criticisms meets the "logical outgrowth" test.

Decisions in the District of Columbia and Second Circuits and even earlier decisions within the Fourth Circuit have reached contrary conclusions. A recent decision by the D.C. Circuit stated that as "a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having vowed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. This notice necessarily must come—if at all—from the agency." *AFL-CIO v. Donovan, supra*, 757 F.2d at 340, citing *Small Refiner Lead Phase-Down Task Force v. EPA, supra* 705 F.2d at 549 (emphasis in original). The decision also conflicts with a recent decision by the Second Circuit. In *National Black Media Coalition v. FCC*, No. 85-4121 (2d Cir. May 27, 1986) the court remanded the case to the Federal Communications Commission for failing to comply with section 4 of the APA. The FCC had announced in a notice published in the *Federal Register* that station applications from minority groups would receive preferential treatment. In its final report, and without prior public notice, the FCC announced that there would be no minority preference policy. In remanding the case, the court remarked, "[t]he FCC now attempts to defend its notice by contending that interested parties were invited to submit other proposals."

Slip Op. at 3687. The Second Circuit rejected that defense and remarked, "if this were enough . . . an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration." *Id.*

In this case, the Fourth Circuit approved EPA's promulgation of a substantially new regulation which was not even based on a new comment, but rather on the Agency's internal determination that the six proposed technologies were not appropriate. It also introduced the element of the Agency's good faith, 780 F.2d at 452, which is irrelevant to the issue of notice and is not a legal substitute for it.

The decision below also conflicts with another Fourth Circuit decision, *Chocolate Manufacturer Ass'n v. Block*. 755 F.2d 1098 (4th Cir. 1985), cited in the decision below. In *Chocolate Manufacturers Ass'n*, the agency proposed regulations concerning the sugar content of federally funded food packages. Flavored milk and its sugar content was not placed in issue by the proposed rule. However, in response to public comment, flavored milk was removed from the program due to its high sugar content.

In that case, the Fourth Circuit recognized that an agency may promulgate a final rule different from the proposed rule, but when the final rule substantially departs from the proposed rule, the original notice is inadequate. The court noted that at the time of proposal the public had not had any indication that flavored milk was at issue, and the very detailed and specific preamble to the proposed rule did not discuss flavored milk. In striking down the final rule, the

court specifically addressed the "logical outgrowth" rule. 755 F.2d at 1105-1106. The court said it did not feel the petitioner was "fairly treated or that the administrative rulemaking process was well served by the drastic alteration of the rule without an opportunity for CMA to be heard." *Id.* at 1106. In the case below, the Fourth Circuit did not distinguish the *Chocolate Manufacturers Ass'n* decision, and cited the case only for the general proposition that an agency may promulgate a final rule that differs in some particulars from its proposals. The court ignored the very detailed and specific *Federal Register* notice and blindly upheld the Agency regulations.

CONCLUSION

This is a case of fundamental importance for agency proceedings, particularly where technical material is involved. In denying the petition for review, the Fourth Circuit failed to meaningfully review the Agency's action. In doing so it also permitted the Agency to violate the notice requirement of the APA and misinterpreted the logical outgrowth rule. The Fourth Circuit's decision creates a conflict among the circuits. For these reasons, this Court should grant the petition for writ of certiorari.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondent.

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Association of Manufacturers ("NAM") respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

The NAM is a non-profit voluntary business association incorporated under the laws of the state of New York. The NAM represents approximately 13,000 com-

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[1] These consents have been filed with the Clerk of the Court.

panies, large and small, located in every state of the Union. Further, the NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States and our members employ approximately 85 percent of all workers in the manufacturing sector.

The NAM and its members are vitally affected by the federal regulatory process of virtually every government agency and department. For this reason, the NAM and its members are active participants in this process and frequently file comments or testify on proposed regulations. The NAM and its members view their participation in this process as an obligation of responsible citizenship and a right that is protected by the First Amendment to the Constitution. The meaningful exercise of this right and obligation requires that we be fully informed of the scope of proposed regulations and the direction that federal regulators intend to proceed.

We believe that the decision of the United States Court of Appeals for the Fourth Circuit below has the effect of stifling fair and relevant discussion of regulatory proposals that are required by the Administrative Procedure Act to be open for public comment. If left undisturbed, this decision could have the effect of eviscerating not only this statutory right to notice and an opportunity to comment, but also the First Amendment right to petition the Government for a redress of grievances. Such a result discourages the very input that is essential to reasoned and balanced rulemaking and undermines the foundations of participatory democracy envisioned by the Framers of this Constitution. For these reasons, as well as those explained in further detail in this brief, the NAM submits the following arguments to this Court in support of the Petitioners.

SUMMARY OF THE CASE

Pursuant to the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982) the United States Environmental Protection Agency (EPA) proposed twelve sets of nationally applicable effluent guideline regulations for nonferrous metals manufacturing, including the lead, zinc and copper industries. These proposals, spanning 95 pages in the Federal Register, and supplemented by a 3-volume, 2100-page proposed Development Document, sought comments from interested parties about six primary "control and treatment options" that were selected for final consideration for the treatment of waste water from nonferrous metals manufacturing plants. EPA's proposed Development Document included more than 25 alternative waste water control options, including a process of sulfide precipitation that was subsequently adopted as a primary method of compliance with the Clean Water Act's requirements. From the 25 technologies, EPA selected six for final consideration and specified them in the Federal Register proposal. Although the EPA requested interested parties to comment on alternative technologies, the six technologies were the basis of the rulemaking proceeding, and after the comment period expired, EPA announced that a seventh technique (sulfide precipitation) was adopted by the agency and included in final regulations promulgated on March 8, 1984. 49 Fed. Reg. 8760.

Petitioners brought suit [2] to set aside certain of the EPA's effluent limitation guidelines and to remand the rulemaking proceeding for further consideration of the sulfide precipitation option. That court ruled that EPA's mention of the sulfide precipitation technology in the proposed Development Document, along with its request that interested parties give comments on similar "alternative

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[2] Petitioners filed suit in the Eight Circuit, and the case was transferred to the Fourth Circuit and consolidated with petitions from other industry groups.

treatment technologies" did not violate the provision of the Administrative Procedure Act ("APA") that requires notice to the public of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1966). It held that EPA could make " 'substantial changes' in its original proposed rule if the changes [were] a 'logical outgrowth' of the original proposal and the notice and comments upon it." *Kennecott v. EPA*, 780 F.2d 445, 453 (4th Cir. 1985). This ruling is now on appeal.

SUMMARY OF THE ARGUMENT

The NAM believes this case raises an important issue concerning the point at which the rulemaking proposals of regulatory agencies change sufficiently enough to warrant a restatement by the agency of their scope, focus and priority. Our democratic system of government demands, particularly in the Age of High Technology, that each branch of government be fully aware of all recent developments and other aspects and ramifications of pending action. Regulatory agencies, charged by law with full and fair consideration of all relevant issues in proposed rulemakings and enforcement activities, are on the front lines of this process, and their decisions have wide-ranging impact with minimal judicial review.

This Court should take this opportunity to adopt a rule of judicial review to provide guidance to the lower courts concerning the point at which a regulatory initiative must be submitted for further comment. Since the Administrative Procedure Act does not provide explicit procedural guidelines for such a supplemental comment period, we would suggest that such a period could be accommodated in a relatively short time frame, particularly since interested parties will already be familiar with the background and supplementary documentation for the rulemaking. This would satisfy both the requirements of the APA, the First Amendment, and the needs

of the administrative agency for a prompt and effective resolution of regulatory issues. Indeed, failure to repropose a rule that is significantly altered during notice and comment proceedings is arbitrary and capricious, and a violation of the APA.

This Court has never before ruled upon the need for regulatory agencies to give reasonable notice of significant substantive regulatory changes arising from comments in a rulemaking proceeding, and a decision is clearly called for.

ARGUMENT

I. FIRST AMENDMENT PRINCIPLES, INCORPORATED BY CONGRESS INTO NOTICE AND COMMENT RULEMAKING, PROTECT THE PARTICIPATION OF THE PETITIONERS AND IMPROVE THE ADMINISTRATION OF LAW.

Because the right to petition the government for redress of grievances is among the most precious of liberties enshrined in the Bill of Rights, any attempt to limit or impair the exercise of that right must be closely examined and justified by a clear public interest. *Thomas v. Collins*, 323 U.S. 516, 530 (1946); *United Mine Workers, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). This Court has developed judicial doctrines to bolster the free flow of opinion to political bodies in order to ensure intelligent decisionmaking. For example, the Court recognizes a constitutionally grounded exemption from liability under the antitrust laws for companies or individuals that work together to effect legislative or administrative change, even if that change has anticompetitive significance. *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Likewise, the Court has struck down restrictions on the freedom of speech and of the press to ensure that the public (including officials and

representatives in the government) are assured a free flow of information on which to base judgments or opinions in our society. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

In the rulemaking context, the freedom of speech is no less important a right for the speaker as it is a necessity and statutory mandate for the regulatory agency. But speech without focus, due to the failure of a regulatory agency to give adequate notice, loses its substance. It suffers from lack of direction, and prevents the speaker from fully and freely expressing his position. Thus, an overly broad or misdirected notice of proposed rulemaking saps the essence of free speech.

The NAM recognizes that statutory regulation of certain aspects of private enterprise, administered by the established executive departments of the government, is a legitimate function of the federal government and is in the public interest. However, the delegation of quasi-legislative authority to federal agencies lacks political accountability when exercised exclusively by unelected regulatory officials. We therefore believe that public participation in the agency decisionmaking process is an essential mechanism that ensures political accountability.

The First Amendment requires no less. In order for the right to petition the government for redress of grievances to be effective, a party must be aware of what governmental action will adversely affect him at a time when petitioning the government will not be a useless gesture. When a complicated and time-consuming rulemaking proceeding is completed, any amendments to satisfy the grievances of adversely affected parties may, as a practical matter, take months or years to fully and properly address, given the workload, priorities, and shifting responsibilities of the agencies charged with the promulgation and enforcement of federal law. The right to petition for redress of grievances is no right at all if the governmental agency that hears the grievance has

effectively and practically precluded resolution of the grievance at the appropriate time. Changing a final rule under notice and comment procedures requires the same panoply of procedural protections that applied in the promulgation of the rule in the first instance. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-42 (1983). Thus, petitioners' request for reconsideration of the final rule promulgated by EPA is decidedly less of right than if the request were accepted by the agency before promulgation of the final rule. With consideration of all arguments before final adoption of a rule, the EPA could avoid having to justify both its position on the final rule and its position on any amendments to the final rule in separate documents by a reasoned analysis supported by substantial evidence on the record considered as a whole. It would much more easily and willingly analyze and decide upon suggested changes and other comments, and would thus accord to the First Amendment right of petition its proper stature in the context of an administrative rulemaking.

For regulation to be fair, each branch of government must be fully aware of all recent developments and other aspects and ramifications of pending actions. Due process and the constraints of the APA require an agency to give notice of either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3)(1966). This notice must be "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking." *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985). The *Chocolate Manufacturers* case and others clearly state and apply the rule that substantial changes from the proposed rule to the final draft require some sort of opportunity for affected parties to be heard. 755 F.2d at 1105. It is imperative that this Court now agree to decide whether

the *Chocolate Manufacturers* case properly states the guiding principle, and ultimately whether the adoption of the sulfide precipitation technology in addition to the six other technologies that were the primary focus of the rulemaking constitutes a sufficient change in the scope or focus of the rulemaking to warrant an appropriate and limited additional notice and period of time in which interested parties may respond. This additional comment period, it must be noted, applies with equal force to all parties interested in the outcome, and EPA may well discover that there is additional information of which it was not aware that further supports its ultimate regulatory decision.

In any case, because technology and our understanding of chemical, biological or other natural forces is becoming so complex and subject to rapid change, a federal agency must ensure that it properly addresses the full implications of its proposed action. It must give the benefit of the doubt whether a change is significant to the public, since the burden of additional notice and comment is minimal compared to that imposed on affected parties after final promulgation of the rule.

Regulatory agencies are on the front lines in the development, interpretation and enforcement of a tremendous quantity of federal law. This Court has recently reaffirmed the guiding principle in administrative regulation cases that reviewing courts should normally defer to the expertise of the agency in technical and complex areas. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). For this reason, procedural determinations by agencies regarding whether to resubmit a significant change in a proposed rule to the public for additional comments are of even more importance. Indeed, judicial review of such decisions is strict, and not limited by the rule of deference accorded determinations by regulatory agencies. *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir.

1979), *cert. denied*, 444 U.S. 1096 (1980). Strict judicial review of procedural determinations by such agencies is essential if the courts will continue to defer to regulatory expertise on the technical issues.[3] Without fairly strict limits on the ability of agencies to make substantial changes in rules without notice to the public, agencies in effect will become courts of last resort, eliminating the judicial branch from any substantive role in the review of regulatory judgments.

A Supreme Court ruling in this case is important to hundreds and hundreds of manufacturers, environmental groups, and individuals affected by EPA regulations. Review by the Supreme Court will also affect the decision-making process of other agencies. For example, proposed regulations under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1985) may involve complex and sophisticated analyses of environmental and epidemi-

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[3] There is a close correlation between the adequacy of notice by a regulatory agency and the amount of deference a reviewing court should exercise. The more leeway an agency has in deciding substantive issues, the more courts should guarantee that procedural requirements have been scrupulously followed. Conversely, if courts were expected to accord *de novo* review of substantive agency determinations (which, of course, is not the law) strict adherence to procedural requirements might not be as important from a constitutional perspective, since affected parties would have a full and fair opportunity to air their grievances on appeal. Where there is some doubt about the adequacy of notice, reviewing courts should pay particularly close attention to the substantive judgments of the agency and the opposing arguments of affected parties. In this case, a number of substantive and technical issues have been raised by petitioners in *Secondary Lead Smelters Ass'n, Inc. v. Ruckelshaus* (No. 85-1748), on appeal from the same Fourth Circuit decision. The adequacy of notice was raised in that petition as well, although its primary focus is on the substantive problems at the administrative level and procedural problems at the appellate level. Because of the question of adequate notice, this Court should approach the petitioners' substantive arguments in *Secondary Lead Smelters Ass'n* with precision and in detail to protect the rights of the parties and the integrity of the administrative process.

ological data relating to employee exposures to potentially hazardous materials in the workplace. Other environmental statutes also require highly sophisticated and complex rulemaking, such as those under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1983), in which the EPA must analyze biological and physical evidence in order to classify hazardous substances according to such factors as toxicity and carcinogenicity. It is just as an important in these areas for the Court to provide guidance to the public regarding the extent to which modifications or alterations of original rulemaking proposals require an additional opportunity for public comment before final implementation.

II. THIS COURT IS THE ONLY APPROPRIATE FORUM FOR RESOLVING HOW THE STATUTORY STANDARDS SHOULD BE APPLIED.

Determining the adequacy of notice is a judicial, not an administrative, function. *National Black Media Coalition v. FCC*, Docket No. 85-4121, 3675, 3684 (slip op., 2d Cir., May 27, 1986). Adequate notice is a critical starting point affecting the integrity of an administrative proceeding, and is essential to improving the quality and fairness of the rulemaking and the enhancement of judicial review. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

Courts have struggled to decide when a rulemaking proceeding has evolved sufficiently to require an amended notice and opportunity to comment on the issues to be resolved. The *Chocolate Manufacturers* case involved a final rule that eliminated flavored milk from a federally funded food program based on comments from the public, without giving any indication to the public that that course of action was contemplated. *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098 (4th Cir. 1985). In that case, the Fourth Circuit criticized the inadequacy of notice and ordered the administrative

agency to reopen the comment period to afford a fair opportunity for interested parties to comment. 755 F.2d at 1107. It decided that the final rule "dramatically altered the proposed rule" and constituted "a complete reversal." As in the instant case, the changes were based on comments received.

Such a change in a rule could have been expected to generate a considerable amount of comment, both favorable and unfavorable, from affected parties had they realized that the agency was going to take that action. In another case, the Third Circuit ruled that the absence of comments from groups which could be expected to oppose or be affected by a significant change from a proposed rule to a final rule belies the contention that notice of the impending change was adequate. *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972). Thus, a reviewing court should look not only at the actual references to the proposed change in the official notice in the Federal Register, but also at the breadth of comments from affected parties, to determine whether notice was full and fair. This is not to say that interested parties who were fully apprised of the impending change but failed to file comments should have a "second bite at the apple." However, where there is doubt as to the adequacy of notice followed by complaints from interested parties, and a dearth of comments from interested parties on the relevant point in the administrative record, a reasonable suggestion of inadequate notice is indicated. This Court must state and explain these procedural points in order to advance the progress and clarity of rulemaking to the benefit of both the agencies and the regulated communities throughout the country.

Several courts have adopted a similar but not identical test known as the "logical outgrowth" test. It provides that a reviewing court will allow an agency to make substantial changes in its original rulemaking proposal as long as they are "in character with the original scheme"

and "a logical outgrowth" of the notice and comments already given. *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985); *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974). The opinion below was based on the notice issue in the logical outgrowth test, but it ignored the crucial factors. 780 F.2d 445, 453 (4th Cir. 1985). It was based on the court's determination, from EPA's references to materials in the 50,000-page administrative record and not mentioned in the Federal Register, that petitioners should have expected the change. Such a finding puts an impossible burden on parties who file comments based on the Federal Register notices of federal agencies.

Even if the Fourth Circuit had properly applied the logical outgrowth test, it is by no means clear that the test produces the same results as a test which considers the substantiality of a rule's change, the complexity of the rule, and the extent of attention by interested parties to the proposed modification. We underscore the opinion of Justices Rehnquist and Powell that this Court should grant certiorari to examine the question. *Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 1097 (1980) (Rehnquist, J., joined by Powell, J., dissenting from order denying certiorari). The question is a recurring one and one "upon which there will never be a 'square conflict' among the various Courts of Appeals, since the differences between the originally promulgated regulations and the finally promulgated regulations will necessarily be ones of degree." 444 U.S. at 1097-98 (Rehnquist, J., dissenting from order denying certiorari).

A rule subjecting agencies to a supplemental notice and comment requirement is also necessary to prevent "regulation by ambush," where an agency simply proposes a rule and states in the Federal Register that it might change the rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact or rationale, or any other alterna-

tives under consideration. An agency may not change a rule on the basis of comments alone if the interested parties were not apprised of how the proposed rule would change. *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985). Rather, the proper method is to repropose regulations that are significantly altered in response to comments. *Ethyl Corp. v. EPA*, 541 F.2d 1, 48-49 & n.100 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). The agency's failure to repropose under such circumstances is arbitrary and capricious, and a violation of the APA. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

It is common practice in regulatory proceedings for an agency to narrow the focus of its inquiry to a select number of realistic options for the final regulation. It would be an insurmountable burden on all interested parties, whether for or against a particular regulation, to have to deal with a potpourri of technologies or options that are available but that are not referred to in the Federal Register as those selected by the agency for final consideration. It would be a monumental waste of time and resources for all interested parties to provide full documentation to an agency on all possible options that might be considered. It is unrealistic and unfair to assume that interested parties should have a crystal ball to forecast possible agency decisions. Rather, it is appropriate to focus on those specific options for which the agency has specifically requested comments. In the kind of wide-ranging rulemaking under consideration in this case, it is essential for interested parties to focus on the primary issues, although they might also include mention of additional issues they feel deserve further consideration by the agency.

In addition, requiring an agency to resubmit rules for public comment furthers the goals of the administrative process and is not burdensome on the agency. Additional time for interested parties to comment would be mini-

mal, since they would already be on notice of the broad parameters of the rule when it was first proposed. Any additional comments made would be easier for the agency to digest, since they would be focused on the new change rather than on the other provisions already covered in the first notice and comment proceeding. Thus, an additional notice and comment period is a reasonable solution to a situation that threatens the fairness of the regulatory process.

It is reasonable to conclude that the sulfide precipitation technology, selected by the EPA after the comments, was not a logical and closely-related outgrowth of the initial EPA proposal. It was a substantial change affecting numerous parties who would have commented if possible, and further notice and comment is necessary and reasonable to ensure that these parties focus their attention and comments on this technology to provide relevant metals-industry data for the EPA to consider. The NAM urges this Court to set forth the legal underpinnings on which such a decision can be made.

CONCLUSION

The freedoms enshrined in the Bill of Rights and incorporated into the Administrative Procedure Act are endangered when regulatory agencies can adopt final regulations that are significantly different from those originally announced under the APA to interested parties. Both the First Amendment and the APA were intended to survive and adapt to technological progress and the ever-increasing informational needs of the public and of governmental authorities. Unless redirected by this Court, lower courts may increasingly defer to the expertise of regulatory agencies on substantive issues even though the agencies have not adequately followed procedures that assure a full and fair discussion of all significant substantive issues.

We therefore respectfully request that this Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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